IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1746

MARY ELIZABETH WILSON,
Plaintiff-Petitioner,

versus

ROBERT W. BICCUM, et al,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

(a) The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Mary Elizabeth Wilson vs. Robert W. Biccum, et al*, 546 F 2d 676 (5 CCA 1977), affirming the opinion of the United States District Court for the Southern District of Mississippi, is an unreported opinion. Both opinions are set forth in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit became final on March 18, 1977, upon Petition

for Rehearing, the original opinion having been entered on February 3, 1977. The jurisdiction of this Court rests on 28 *U.S.C.* 1254(1).

QUESTIONS PRESENTED

1. Whether an individual citizen has a civil right to resort to the courts in a civil suit.

2. Whether the plaintiff can maintain a suit under the Civil Rights Acts for damages against individuals who successfully conspired to deprive the plaintiff of her ability and consequently her right to sue a credit reporting company.

3. Whether the plaintiff can maintain a civil rights action under the Civil Rights Acts where most of the defendants were employees of another defendant where all of the conspirators acted for the individual, separate and distinct benefit of themselves, separately.

4. Whether a suit for a conspiracy which damages an individual may be brought before damage occurs.

5. Whether the doctrine of collateral estoppel applies to bar such an action against the credit reporting company and/or its employees who conspired each individually for each individual's separate benefit where the plaintiff has previously sued the credit reporting company alone in its individual corporate capacity for a libel.

6. Whether the defendants were acting under color of law within the terms of 42 *USC* §1983.

7. Whether 42 USC §1986 applies to the individual defendants in this case and whether the statute of limitations in said statute commences to run at the time the damages have been finalized (in this instance the date that the Fifth Circuit affirmed the decision of the District Court to deny the plaintiff the direct cause of action against the Retail Credit Company on February 20, 1972.)

8. Whether the pendant state claim of conspiracy is subject to being dismissed because of any of the above.

STATUTES INVOLVED

Title 42, *United States Code* §1983

§1983. *Civil action for deprivation of rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13.)

Title 42, *United States Code* §1985

§1985. *Conspiracy to interfere with civil rights*

Third: If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons with such State or Territory the equal protection of the laws, or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right of privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (Act July 31, 1861, c. 33, 12 Stat. 284; April 20, 1871, c. 22, §2, 17 Stat. 13.)

MISSISSIPPI STATUTE OF LIMITATIONS

Title 15 Chapter 1, §49 *Mississippi Code* of 1972. ACTIONS TO BE BROUGHT IN SIX YEARS

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of action accrued, and not after.

SOURCES: *CODES*, 1880 §2669; 1892 §2737; 1906 §3097; Hemingway's 1917, §2461; 1930 §2292; 1941, as amended §722.

STATEMENT OF THE CASE

Introduction

The plaintiff brought this action in the United States District Court for the Southern District of Mississippi alleging that she had been damaged by a conspiracy. The aim of the conspirators was to deprive her of several civil rights including the right to sue a credit reporting company for its libelous credit reports on her. Plaintiff claims that the damages dealt her by the defendants' conspiracy manifested itself in final form on February 20, 1972 when this Court affirmed the District Court which held that there was no remedy for her at common law for the libel since the statute of limitations had run.

Within a year, and on December 18, 1972, the plaintiff filed this suit alleging four causes of actions arising out of a conspiratorial course of conduct undertaken by the various named defendants. Plaintiff brought

her suit for conspiracy against the defendants under 42 *USC* §1983, §1985(3); §1986, and the common law of the State of Mississippi. The first three causes of action for conspiracy are brought under the Civil Rights Acts and the fourth cause of action is a pendant claim brought under the common law of the State of Mississippi.

The plaintiff based her federal causes of action, and the pendant claim as well, on the damage done her by the conspirators in depriving her of (1) equal protection of the laws, (2) equal privileges and immunities under the law, and; (3) other federally protected rights including the right to contract to pursue a chosen profession, and finally, and most important, the conspiracy deprived her of the right to maintain an action in court and the fundamental right of citizenship to resort to the courts for protection.

Plaintiff set out, with specificity, several detailed factual occurrences and overt acts in furtherance of the conspiracy, and alleged numerous others, including the various separate acts of the defendants in filing affidavits and court pleadings, in other suits, to further the aim of the conspiracy which was to deprive her of her day in court.

Plaintiff does not sue for defamation in this suit, nor does plaintiff sue for any of the damage caused her by the direct and proximate consequences of the outlandish credit reports issued by Retail Credit Company on her in 1961, 1963 and 1964.

In this suit, plaintiff sues for the damage done her by the conspiracy as is more completely discussed in the ensuing brief.

Defendants answered plaintiff's first amended complaint and the issue was joined on the allegations of conspiracy and the defenses as set forth in the two respective pleadings.

The defendants answered with eight separate defenses which are enumerated as follows: (1) that the complaint failed to state a claim; (2) the defendants denied a conspiracy; (3) that the statute of limitations of the State of Mississippi had run; (4) that the one year limitations contained in 42 USC §1986 had run; (5) good faith and privileged communications; (6) collateral estoppel; (7) laches; (8) *Stare Decisis;* (9) injunction and estoppel.

Several briefs were filed with the District Court by the plaintiff and by the defendants and the plaintiff offered evidence to show that she previously had a cause of action against the defendant Retail Credit Company but that the conspiracy and the separate and several overt acts of the defendants in furtherance of the conspiracy had successfully procured the running of the statute of limitations, and that she suffered separate independent damage from this continuous conspiracy.

The defendants controverted all evidence offered by the plaintiff except the evidence submitted by the plaintiff that the defendant created a class of individuals for its own profit and convenience against

which a continuing discrimination had been practiced during the years alleged to have been involved in the conspiracy against the plaintiff. Plaintiff established this class for the purposes of the motions filed by both parties for summary judgment by affidavits and a deposition, both given by former employees of the defendant Retail Credit Company as well as by copies of internal communications of the defendant Retail Credit Company.

The District Judge rendered his opinion on the doctrine of collateral estoppel. The District Court so held in the instant suit although the District Court in an earlier suit against Retail Credit had denied, *without prejudice*, plaintiff's motion to add all of the instant defendants and sue all of them for conspiracy in that earlier suit. This point is more fully discussed in the ensuing brief.

The District Court apparently did not touch on any other points of law in the some several pages of its opinion othe.' than the statute of limitations contained in 42 *USC* §1986. The District Court held that the statute of limitations had expired for bringing an action under 42 *USC* §1986.

Ironically, the District Court's contextual citation from a Fifth Circuit case cited the case of *Garraway v. Retail Credit*, 141 So 2d 727, which was a case where the Supreme Court of Mississippi held that the doctrine of collateral estoppel did not apply in a case where the parties and subject matter were exactly the same, as an earlier suit, the remedy sought being different. This is obviously not at all similar in this instant appeal as is discussed *infra* in argument.

Further, this case involves the basic question of whether an individual Plaintiff can bring suit for a conspiracy to deprive that Plaintiff of that Plaintiff's day in court, which of necessity is determined by whether that person has federal protected civil right to resort to the Courts for a remedy.

The Court of Appeals for the Fifth Circuit has on two occasions adopted the logical extension of this Court's ruling in *Griffin v. Breckinridge (infra)*. *Westberry v. Gilman Paper Company*, 507 F 2d 206 (5 CCA), and *McLellan v. Mississippi Power Company*, 526 F 2d 870. On both occasions the Fifth Circuit has recalled its ruling, *Westberry* in the same citation by a *per curiam* addendum, and *McLellan*, 545 F 2d 919 (5 CCA) 1977).

ARGUMENT

Certiorari should be granted for a full hearing on this petition and the case should be remanded to the lower Court for a full trial on the merits for several sound judicial reasons.

On two occasions, the United States Court of Appeals for the Fifth Circuit, as has been mentioned above, has ratified the logical and sound extension of *Griffin v. Breckinridge*, 403 U.S. 88, 19 S. Ct. 1790, 29 L.Ed. 2d 338 (1971).

The two principal cases are *Westberry v. Gilman Paper Company (supra)*, and *McLellan v. Mississippi Power Company (supra)*.

The *Westberry* case was a suit against conspirators for conspiracy to murder *Westberry*. The District Court dismissed the suit, and the panel, with one judge dissenting, reversed and remanded the cause for trial under 42 U.S.C. Sec. 1985(3). After a poll of the Fifth Circuit Judges, rehearing *en banc* was granted, and, prior to rehearing, the case was settled rendering it moot, and the Court's opinion was, consequently, withdrawn 507 F 2d 206, at 211.

In the *McLellan* case, the Plaintiff availed himself of his federally granted right to declare bankruptcy in the United States District Court in Jackson, Mississippi. His employer discharged him under a policy maintained by the employer, and apparently agreed to by the co-defendant union, the International Brotherhood of Electrical Workers. McLellan sued his employer, the local chapter of the union and the International, for a conspiracy to deprive him of what he alleged was federally protected right to declare bankruptcy.

After dismissal in the District Court, the United States Court of Appeals for the Fifth Circuit in a panel decision reversed and remanded holding that Plaintiff had a federally protected civil right which had been impaired by the acts of the Defendants, if true, as alleged. *McLellan* I, 526 F 2d 870.

On rehearing *en banc*, the Court of Appeals held over a scathing dissent, that for an action to be maintainable under 42 U.S.C. Sec. 1985(3) that the conspirators must commit an independent violation of the law, regardless of how other legal rights of the Plaintiff might be effected. In other words, the Fifth Circuit held that Plaintiff could not maintain an action

under the Civil Rights Act of 1871 for conspiracy to deprive him of a valuable federally protected civil right unless the acts of the Defendants violate some other law than 28 U.S.C. Sec. 1985(3). Thus, the Court of Appeals for the Fifth Circuit engrafted an artificial and improper additional element, not required by previous decisions of this Court or the statute on to a title 28 U.S.C. Sec. 1985(3) action.

Chief Judge Brown, Judge Goldberg and Judge Godbold, dissenting vigorously attacked the majority view, stating quote "common sense tells us that private individuals can, without breaking any specific law, place cognizable obstacles in the path of someones quote 'equal enjoyment of legal rights' ", 542 F 2d 919 at 935, *et seq*. Plaintiff adopts the position of the dissent, and urges this Court to closely examine the majority opinion.

There is a division among the Courts of Appeal, as admitted by the Fifth Circuit in *McLellan* II (footnote 22).

The Fifth Circuit stated:

> "If the Defendants have not conspired to act contrary to law, and object of a Section 1985(3) conspiracy has not been made out and the section is inoperable, regardless of whether the legal rights of the Plaintiff are somehow affected. McLellan (*supra*).

Then the Court in Footnote 22 places itself in conflict with the Fourth, Seventh and Eighth Circuit Courts of

Appeal on the question whether Section 1985(3) is strictly and merely remedial or whether it also grants substantive rights.

After the Fifth Circuit's ruling in *McLellan* II (*supra*), the instant case was decided by the United States Court of Appeals for the Fifth Circuit stating:

> "The Sec. 1985(3) falls before our *en banc* decision *McLellan v. Mississippi Power and Light Company*, 5 Cir., 1976, slip opinion p. ____, ____ F 2d ____, rev'g.,

Assuming that the terse language of the Court of Appeals meant that the Plaintiff must meet all of the requirements of *McLellan* II, Plaintiff examined those parts of the *McLellan* requirements that might not have been met on the original complaint and appeal. The only requirement that Plaintiff's original complaint and appeal had not emphasized were new requirements first set forth in *McLellan* II (*supra*).

Plaintiff brought a petition for rehearing based upon the possible misapprehension of basic facts by the Fifth Circuit which were not emphasized at the time of the briefing and oral argument in this cause since the Court of Appeals second *McLellan* decision had not been handed down at the time this case was taken under submission.

Plaintiff set out in her petition for rehearing six misdemeanors and one felony cognizable under the State Law of Mississippi, that had not been emphasized originally, since the requirements did not exist at that time. (All were inherent on the face of the record).

The Court of Appeals denied rehearing without opinion, hence this petition for Certiorari.

There are several good reasons why Certiorari should be granted, in addition to the divergence among the Circuits pointed out by the Fifth Circuit's opinion.

First, all of the plaintiff's causes of action could not have accrued to the plaintiff prior to the rulings of the Fifth Circuit in the cases of *Wilson v. Retail Credit*, 438 F 2d 1043 and later on February 20, 1972 in the case of *Wilson v. Retail Credit*, 474 F 2d 1260. The plaintiff contends that the damages caused her by the conspirators arising out of the conspiratorial agreement occurred when the Fifth Circuit affirmed the District Court's rulings in both cases cited immediately above since she was damaged at that time. It is plaintiff's contention that she could not have brought this suit if the defendants' conspiracy had not actually procured the running of the statute of limitations since she would not have been damaged if their conspiracy had not caused her to lose her choses in action as well as her right to her day in court. It is Hornbook Law that the damage caused by a conspiracy is the basis of the action. *Professer* on torts 1 Vol. Ed. 1953.

Plaintiff has never sued the individual defendants before. Therefore, the doctrine of collateral estoppel can not apply to the individual defendants. Plaintiff concedes that possibly, under a strained interpretation of the doctrine, the defendant corporation might be released from liability under the doctrine of collateral estoppel, but plaintiff's contention is that

the defendant Retail Credit Company is not released by the doctrine because the damage did not occur until the time mentioned above.

Plaintiff also contends that her common law cause of action for conspiracy should be granted a full trial based on the same reasoning. However, if this Court does not conclude that the Civil Rights Acts apply, then, the pendant claim must be dismissed for want of jurisdiction since there is not complete diversity, the plaintiff now being a resident of the State of Alabama as is at least one of the defendants.

Additionally, plaintiff contends that none of the defenses offered by the defendants are good defenses. The decision of the District Court did not turn upon any of the defenses other than collateral estoppel and the one year statute of limitations contained in 42 *USC* §1986. Appellant does not deem it necessary to cite lengthy authority in opposition to the defenses not employed by the District Judge in his decision. Plaintiff requests that the Court grant plaintiff an opportunity to be heard on, and brief, any other legal issues other than those upon which the District Court's opinion turned, should the Court be inclined to base its decision on any other point of law.

Finally, plaintiff takes the position that a civil rights complaint, particularly one of the nature of the instant case should not be dismissed at the pleadings stage except under the most extraordinary conditions.

I.

Whether An Individual Citizen Has A Civil Right To Resort To The Courts In A Civil Suit.

Although it appears adequately clear that a criminal in prison has a clear right of access to the courts, which is a federally protected civil right, *Campbell v. Beto*, (5 CCA, 1970) 460 F 2d 765, there is little authority to the effect that an individual has a right of access to the courts for a civil case.

There should be no doubt that the right of access to the courts exists as a fundamental right. The law in the matter, aside from scant mention, is not extensive. However, two leading United States Supreme Court cases have expressed the importance of the right to litigate or sue and have held that the equal protection of the law doctrine applies to this right. See *Boddie v. Connecticut*, 461 US 371 (1971). In *Barbier v. Connolly*, 113 US 27, 31 (1885), the Court said that the Fourteenth Amendment was intended to insure "that all persons . . . should have like access to the courts of the country for the protection of their person and property and the prevention and redress of wrong".

Further, in *Chambers v. Baltimore and Ohio Railway*, 207 US 142, 148 (1907), the Court said:

> The right to sue and defend in the Courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

It appears then, that there should be no doubt that the right to resort to the courts is a right preservative of all rights, and is therefore fundamental. Goodpaster, "The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Court", 56 *Iowa Law Review* 223 at 253.

Additionally, and in keeping with the main thrust of the plaintiff's complaint in this law suit, it has been said that the sweep of the statute which makes it a crime to conspire to injure any citizen in the free exercise and enjoyment of his federal constitutional rights is not confined to rights expressly defined in the Constitution, but includes those rights judicially determined to be fundamental and embraced by implication with the equal protection clause of the Fourteenth Amendment. *U. S. v. Anderson*, 481 F 2d 65 [interpreting the criminal counter-part of §1985(3) 18 *USC* 241]. There is no doubt that the Constitution grants the right to the citizen to resort to the courts by the creation of the courts.

II.

Whether The Plaintiff Can Maintain A Suit Under The Civil Rights Acts For Damages Against Individuals Who Successfully Conspired To Deprive The Plaintiff Of Her Ability And Consequently Her Right To Sue A Credit Reporting Company.

The plaintiff brought this action to recover damages resulting to her from a conspiracy between the various parties defendant, as is more fully set forth in the amended complaint, in detail (R-110), alleging par-

ticular and specific acts, and incorporating by reference several written memoranda and acts of the defendants which were substantiated by admissions of the defendants, and which were made the basis of a motion for partial summary judgment by the plaintiff. Plaintiff does not appeal from the order denying her partial summary judgment since plaintiff feels that a plenary trial of this cause is the only judicially acceptable method of disposing of this case.

On the other hand, plaintiff feels that the judgment entered against her by the Court in favor of the defendants is erroneous and wrong, hence this petition.

There is no doubt that the defendants acted in concert to hide the plaintiff's cause of action. This is set forth in the complaint on file (R-110) which enumerates at page 4 of the complaint some nine separate overt acts of the defendants. Additionally, plaintiff made reference in the complaint to the affidavits executed, by the defendants, under oath, filed in the previous law suits. (Defendants subsequently filed, with their answer, copies of the entire record in the earlier law suits, two of which are relevant. Exhibit "C" to the answer is the record in of the late William Roberts Wilson, Sr.'s suit against Retail Credit and is completely irrelevant for the purposes of this suit.)

Exhibits "A" and "B" to the answer are the two suits where Mrs. Wilson's causes of action in this suit were perfected, perfection occurring February 20, 1973 in Cause Number 72-2984 on the Fifth Circuit's docket.

The affidavits in exhibit "B" are found at pages 83, *et. seq.* of the record of that cause which is exhibit "B".

They are contained in that record as an exhibit to an affidavit.

The same affidavits are in exhibit "A" at the following indicated pages and are more easily located in "A" in the copy of Plaintiff-Appellant's brief which replaces the record (destroyed by fire in New Orleans), to-wit: Defendant Hammond at page 55, *et. seq.*; Defendant Drone at page 58; Defendant Curtis at page 60, *et. seq.*; Defendant Tackett at page 63, *et. seq.*

It is submitted that the destruction of the record and the incomplete and haphazard substitute would make it easier to refer to one of the original briefs.

It is practically undisputable that the defendants zealously engaged in a series of overt acts beginning in 1963 and ending as late as the Fall of 1972 which series of acts had as its sole purpose the prevention and later, vitiation, of the plaintiff's law suits for libel. It is indisputable, and was the avowed purpose, in those cases previously before the Fifth Circuit, that the purpose and objective of the various affidavits filed by the defendants in those cases had no purpose other than furthering the aim of the conspiracy, which was to deprive the plaintiff of the right to sue the Retail Credit Company.

The defendants' acts then, appear to have been designed specifically and solely for the purpose of denying the plaintiff her day in court. This is an illegal activity and one against which plaintiff is protected by the law.

Of course, the essence of a civil conspiracy is a concert or combination to defraud, or *cause other injuries to person or property, which results in damages* to the person or property of the plaintiff. *Black's Law Dictionary*, Fourth Edition 1951.

There are two basic types of conspiracy which are actionable.

First: A combination of persons to accomplish an unlawful purpose, even though they employ lawful means.

That is, that even though individuals acting in concert and together employ perfectly legal methods for the carrying out of their conspiracy, they still are liable for civil damages when they achieve their illegal purpose.

Second: A combination of conspirators to achieve a lawful purpose by unlawful means.

In other words, the second basic type of conspiracy which is actionable is that in which a combination of conspirators achieve a perfectly lawful purpose by the use of illegal and unlawful means.

See *Southern Christian Leadership Conference, Inc. v. The A. G. Corporation*, 241 So 2d 619; *Mississippi Power and Light Company v. Town of Coldwater*, 234 Miss. 615, 636, 106 So 2d 375 (1958), 15 *CJS* "Conspiracy", §1 (p. 906); also §§8 and 9 thereof (at p. 1003 and 1006-7.) Re: both types of conspiracy.

In this case, plaintiff has alleged the first type of conspiracy. This action lies against defendants because they employed lawful means, to conceal the libel, which achieved the obviously unlawful end of denying the plaintiff of her right to resort to the courts for relief against the Retail Credit Company in the two earlier suits.

Plaintiff was not damaged until those earlier suits had been terminated in the Court of Appeals by affirmance of the District Court's decision dismissing each of those earlier suits.

To present the case in its proper light, the plaintiff summarizes with a brief synopsis of the facts leading up to the filing of this law suit:

In June of 1961 and September 1963 and in May of 1964 and at various other times, the defendants, Retail Credit Company and some of its employees, issued and concealed libelous credit reports concerning the plaintiff. The descriptions of the plaintiff contained in the reports were outlandish, although that is not the basis of this law suit.

The plaintiff, becoming concerned that something might be wrong, made inquiries to several of the conspirator defendants and was lied to on each occasion by the defendants who immediately engaged in feverish activity to conceal the fact that they had libeled the plaintiff. The defendants even resorted to clandestinely shipping the file out of the state and the jurisdiction of the Mississippi Courts to Atlanta, Georgia because "it might become a matter of controversy". (See admission of Robert Biccum admitting that the documents on pages 28-31 of the record were prepared by him, admission is of record at page 45.)

Furthermore, the defendants denied that they had even investigated the plaintiff. However, the Senate Subcommittee on Anti-Trust and Monopoly of the full Judiciary Committee discovered that the defendant had lied concerning those denials. This was discovered in 1968 in a Congressional investigation which turned up, for the first time, the unbelievably horrible credit reports on the plaintiff.

Two earlier suits, one for libel and the second for products liability, by the plaintiff against the defendant Retail Credit Company were dismissed because the statute of limitations problem and the technicality of failure to allege malice. This suit has been filed by the plaintiff against the separate and several defendants charging the separate and several defendants with a conspiracy to conceal a cause of action for libel and slander which thereby deprived the plaintiff of a cause of action against the defendant Retail Credit Company by successfully concealing the cause of action until the statute of limitations had expired. (It being determined that the statute of limitations had run by the decision of the Court of Appeals as mentioned above.)

This suit has been instituted under the Federal Civil Rights Acts, as well as the common law of the State of Mississippi. This suit is based upon a conspiracy of individuals among one another as well as a conspiracy between the said individuals and the corporate defendant Retail Credit Company.

The threshold question under the heading of this particular issue is whether the facts as pleaded present plaintiff with a valid cause of action under the Federal Civil Rights Acts.

The plaintiff contends that she has stated a valid cause of action because the plaintiff has shown that the plaintiff can prove, and, in fact, has proven to a great extent, that the defendants agreed to purposely and intentionally deny the plaintiff her right of access to the court to litigate the earlier suits on the merits.

The Federal Civil Rights Acts contain three principal provisions that may be used to state a cause of action for a conspiracy violative of a plaintiff's civil rights. 42 *USC* §1983; 42 *USC* §1985(3) and 42 *USC* §1986.

The first of these, 42 *USC* §1983, will be of use to the plaintiff only if the Court determines that the judicially granted qualified privilege and commercial custom extended to the Retail Credit Company under the laws of the State of Mississippi (*Garraway v. Retail Credit Co.*, 126 So 2d 271) and the practices and usages of the locality, state and community is sufficient state action to control or be involved in the discriminatory treatment complained of by the plaintiff. *Adickes v. Kress*, 398 US 144 (1970).

It has been demonstrated that the defendants' reliance on the judicially protected privilege and the custom and usage of the times, made it virtually impossible for the plaintiff to learn of the nature of the libelous credit reports, and this appears to be sufficient to state a cause of action uner 42 *USC* §1983,

because there was a discriminatory action by the defendants against the class of persons upon whom libelous credit reports were made. The judicially protected privilege applied to all such persons who were libeled and acted to deny them their right of access to the courts.

The cause of action under 42 *USC* §1983 is governed entirely by this Court's interpretation of whether or not the judicially granted privilege and the custom and usage constitutes sufficient state actions to clothe the defendants with state authority or state action.

Plaintiff has shown through the affidavit of William F. Boza (R-154) and the deposition of Len O. Holloway (R-160 at page 8 thereof, beginning at line 24 on page 8 and continuing to line 24 on page 9 in said deposition) that the defendant Retail Credit Company created a class of persons by requiring that a certain percentage of the individuals upon whom reports were made to be placed in the "declines" category class. The requirement that a certain percentage of individuals be given unfavorable reports creates a class and the defendants conspired to discriminate against Mrs. Wilson, a member of that class, to deprive her of her access to the courts.

Consequently, it appears that there is sufficient state action in custom and usage of the community, as employed by defendants, to imply a cause of action under §1983 of Title 42.

There is no doubt, and it positively appears, that 42 *USC* §1985(3) definitely gives a good cause of action to

the plaintiff for relief from the oppressive acts of the defendants. The pertinent portion of §1985(3) is set forth in the table of statutes, page i. *supra*. The plaintiff comes within this legislation inasmuch as she has on file in this case a complaint which alleges that the defendants committed all of the following necessary acts: (1) that the defendants did conspire; (2) for the purpose of depriving the plaintiff directly of the equal protection of the laws as well as the equal privileges and immunities secured under the laws. Further, plaintiff has asserted that all the conspirators (3) did act in furtherance of the object of the conspiracy, whereby the plaintiff was (4a) injured in her person and property, (4b) she was further deprived of having and exercising her right to sue as a citizen of the United States. Plaintiff has thereby met the burden of alleging each and every, and in the instance of item (4), both alternatives as required by the ruling of this Court in the case of *Griffin v. Breckinridge*, 403 US 88, 102-03 (1971).

In the discussion that follows, each of these requirements will be treated individually and show that the facts as presented by the complaint, the admissions on file by the defendants and the exhibits filed by the defendants support the plaintiff's cause of action (and actually right to judgment) under §1985(3).

Concerning the first requirement, conspiracy, as has been defined above, is an agreement, manifesting itself in words or deeds, whereby two or more persons agree to commit an unlawful act by legal means, or to commit a lawful act by illegal means. *Webster's New International Dictionary*, 570 (2nd Ed., 1949). In this

case, means were employed which will be considered legal, as urged by defendants, for purposes of argument, to deprive the plaintiff of her day in court to sue on the libelous credit reports. *The result was clearly unlawful.*

It was held in the past that there was a requirement that some aspect of state action be involved in a conspiracy for the cause to be actionable under 42 *USC* §1985(3). However, the ruling of this Court in *Breckinridge (supra)* clarified that requirement and held that "it is evident that all indicators, texts, companion provisions and legislative history, point unwaveringly to §1985(3)'s coverage of private conspiracy" (*id.* at 101).

The second requirement for a successful action under §1985(3) which should be discussed at the same time that the first requirement is discussed calls for the plaintiff to show an element of intent or purpose in the discrimination against her by the defendants. *Breckinridge* (*supra* at 102). This Court expressed itself thusly:

> The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. (*Breckinridge*, 403 US at 102).

There can be no doubt but that the activities of the defendants were aimed at concealing the cause of action from the plaintiff. The second requirement is as well met and satisfied by the obvious intent manifested by the defendants to deprive the plaintiff of

her day in court by their vigorous activities which had as their avowed, stated and sworn purpose the essential aim, and sole aim, of precluding plaintiff's right to litigate her cause of action before a jury in the District Court. The affidavits filed by the defendants (*supra* pp. 17-18) urging the District Court to sustain the defendant Retail Credit Company's plea of the statute of limitations are of record in those cases. The defendants may not dispute that all of these affidavits were for the sole singular purpose of convincing the District Court that the statute of limitations had run in the earlier cases.

The admissions in file indicate that as early as the year 1963 that the defendants were afraid the plaintiff might sue them and moved her file out of the State of Mississippi to the State of Georgia so that it could not be discovered (see admissions of Biccum (R-29 *et. seq.*)

It is apparent from the other admissions that a prolific amount of communication took place between the defendants relative to the plaintiff's innocent inquiries about her credit report.

The plaintiff's requests for admissions to the defendants are set forth at pages 14, 18, 20, 24 and 26 of the record. The admissions are of record at pages 41, 43, 45, 47 and 51 of the record. It is undisputed that the defendants engaged in vigorous written communication relative to the plaintiff and the possibility that the plaintiff might be able to take some sort of court action against them. Presumably there were also verbal communication as well. The defendants, as might be ex-

pected, deny that they had any conspiracy in mind, but it is obvious as well as law of the case that Mrs. Wilson was not able to sue the defendant Retail Credit Company after the defendants undertook all of the activities, mentioned above and below, which are the basis of this present suit.

In the instance of the admissions of the defendant Biccum (request and attached documents R-26 — R-31; admission R-45) the defendant Biccum, with several of the other defendants, including defendant Miller, defendant Drone and defendant Grobe, engaged in a series of communications between offices beginning as early as October of 1963 and continuing through April 16, 1964 which demonstrate their concern that Mrs. Wilson might mount some sort of law suit against them. At R-29 Biccum states:

> In the event our recent reports *should become a matter of controversy*, we would want to know just what we could depend upon to back up each item in our report. (emphasis supplied)

Later, at R-31 there is a memorandum generated from the office of defendant Biccum on October 25, 1963 which requests in paragraph 3 thereof that defendant Grobe "determine whether there was a lack of confidential handling" with a suggestion to Grobe that Grobe read the riot act to the suspected leak in security which might have given Mrs. Wilson an inkling of what was in the scandalous credit report that they had generated about her.

There follows in the same communication, a part of the same memorandum which was to be sent apparently to Jackson, Mississippi. The 6th paragraph is followed by a one line sentence which indicates that the file will be kept away from Mrs. Wilson's area, presumably to prevent her discovery thereof.

Previously, in the record of admissions of Biccum, and later in time, a memorandum was generated on April 15, 1964 by defendant Biccum addressed to Memphis, to the defendant's office there and particularly to defendant Miller in Jackson, Mississippi requesting that Miller "send in again all the files you have on Mrs. Wilson and her husband".

Defendant Biccum was getting the file safe and secure out of the jurisdiction of the courts of Mississippi after the decision in *Garraway II*, which the defendant Retail Credit lost upon remand to the Circuit Court of Adams County, Mississippi. *Garraway v. Retail Credit*, 141 So 2d 727 (*Garraway II*)

Finally, all the affidavits filed in the previous Mary Wilson cases (incorporated herein in the record of the second Mary Wilson case and the reconstructed, *ad hoc* record of the first Mary Wilson case) and the pleadings of the individual defendant Retail Credit can be interpreted as having one and only one intent, that intent was to deprive the plaintiff of her day in court, by representing to the lower Courts that the statute of limitations had expired on the libel after defendants had previously, and successfully, concealed the first libel from the plaintiff. There can be no doubt but that the conspiracy had only one purpose and only one intent. That intent was successful on February 20, 1973, and the plaintiff was damaged on that date.

The question might arise as to whether or not there is a second aspect to the second requirement, as enumerated above, that of íntent, as to whether or not the defendants' action constituted a deprivation of "equal protection of the laws, or equal privileges and immunities under the laws". Although most of the cases reported that deal with 42 *USC* §1985(3) have been racial discrimination cases, the wording of the statutes certainly does not confine plaintiff to such fact situations. Rather, one would assume that an individual who was not the victim of an ethnic based conspiracy would have recourse to the law as well. In fact, one of the leading commentators on the Civil Rights Acts, Chester Antieau, Esq., Professor at Georgetown University School of Law, in his volume entitled *Federal Civil Rights Acts: Civil Practice* (1971) at page 125 states that rights protectable under 42 *USC* §1985(3) "are rights created by federal laws, rights owing their existence to the federal government, and rights protected by the federal Constitution." Further, the privileges and immunities protected under subsection 3 of 42 *USC* §1985 should be the fundamental rights according to the lessons of American History (*ibid.* at 131.)

There is no doubt that the right of access to the courts is fundamental. As set forth hereinabove, the law on the matter, aside from scant mention, is not extensive. However, there is no doubt that the Constitution grants plaintiff the right of recourse to the courts.

In summation of the first and second requirements, the plaintiff submits the plaintiff can easily show that the defendants made an agreement to purposely and intentionally deny her access to the courts, and that the right of access to the courts is one that is to be enforced by 42 *USC* §1985(3). There is no dispute that the right of access to the courts is one that is enjoyed by nearly all citizens, meaning, in effect, that the plaintiff was discriminated against and not enjoying this right.

The third and fourth requirements necessary for the plaintiff to sustain her cause of action under §1985(3) present no problem to plaintiff.

The third requirement is that the plaintiff must show that at least one of the conspirators did, "any act in the furtherance of the object of the conspiracy." *Breckinridge* (*supra*). This requirement would be satisfied by the plaintiff proving some of the acts enumerated in the complaint, all of which have been admitted by the defendants, plus the additional allegations of the complaint which plaintiff proved to the extent that plaintiff felt justified in moving for partial summary judgment in the lower court. The third requirement would be further satisfied by proof of the filing of affidavits in the earlier cases for the sole and only purpose of convincing the court that the defendant Retail Credit was protected by the statute of limitations after the individual defendants, acting for their own individual purposes and profit successfully concealed the cause of action for libel from the plaintiff.

Several of the conspirators actively participated in the earlier suits by executing these affidavits. These

affidavits were executed in 1971 and 1972 and were some of the latter overt acts in furtherance of the object of the conspiracy.

The fourth requirement, or the two alternatives of the fourth requirement as it might be expressed, requires that the plaintiff demonstrate an injury to her personal property or to a federally protected fundamental right of citizenship.

The requirements of 4(a) that the plaintiff be injured in her property are satisfied conclusively when it is shown by the rulings in plaintiff's prior cases before this Court (*Mary Wilson v. Retail Credit Co.*, 438 F 2d 1043; *Mary Wilson v. Retail Credit Company*, 457 F 2d 1406) that the plaintiff was, in fact, denied her day in court, thereby depriving her of her chose in action (her property) as well as her right to vindicate her name in court (her person).

Finally, in the case of *Lynch v. Household Finance Corp.*, (1972) 405 U.S. 538, 31 L Ed 2d 424, 92 S Ct. 1113, reh. den. 406 U.S. 911, 31 L Ed 2d 822, 92 S Ct. 1611, the Supreme Court enunciated the policy of protecting property rights under the Civil Rights Acts as a fundamental right of citizenship.

The alternative and disjunctive requirement 4(b) would be conclusively satisfied if the court accepts the argument that the right of access to the courts of this nation is one of the rights or privileges meant to be protected as a fundamental right of citizenship by 42 *USC* §1985(3).

The nature of a conspiracy law suit is such that the elements may be permissively proved by circumstantial evidence. Although the instant case demonstrates clear and convincing evidence sufficient to establish the conspiracy without circumstantial evidence, it is interesting to note in the following cases, most of which were criminal cases, circumstantial evidence was deemed satisfactory under the more exacting requirements of a criminal case: *U. S. v. Jacobo-Gil*, 474 F 2d 1213 (1973, CCA 9); *Delli Paoli v. United States*, 352 U.S. 232, 236, 77 SC 294, 1 L Ed 2d 274 (1957); *Blumenthal v. U. S.*, 332 U.S. 539, 557, 68 SC 248, 92 L Ed 154 (1947).

The immediately foregoing cases are criminal cases wherein the standard of proof is different from that of a civil case. Although in the criminal proceedings the holding was, in all of the above cases, that circumstantial evidence can prove a conspiracy. In the *Southern Christian Leadership Conference* case (*supra*) it was likewise held that circumstantial evidence can establish a conspiracy. Additionally, see *U. S. v. Brooks*, 473 F 2d 817 (CCA 9).

Also, if the court should hold that the provisions of 42 *USC* §1983 should apply, there is no need for a proof of a conspiracy and there is no need for proof of racial animus. *Smith v. Ross*, 482 F 2d 33 (CCA 6).

Perhaps the law of conspiracy was best put into perspective by Mr. Justice Pitney in his opinion in the *Frey* case where he stated:

> "Just as the mechanism of a watch affords evidence of a design, and hints of a designer, so a systematic course of action, pursued at one and the same time, by many persons, and effecting their mutual interests, raises a fair inference of an agreement between them to pursue that course of action." *Frey & Sons v. Cudahy Packing Company*, 256 US 208, 217-218.

There is good authority to the effect that conspiracy may be pursued by filing pleadings, and other matters in court proceedings. In this case, plaintiff alleges that the last overt acts in furtherance of the conspiracy were the filing of court pleadings, which finally resulted in the natural and probable consequence of her being denied her day in court by the rulings of the courts.

In holding that the filing of documents in court is actionable, if done in the furtherance of a conspiracy, the United States Court of Appeals in the Third Circuit in the case of *U. S. v. Johnson*, 164 F 2d 42, *cert den.* 332 U.S. 852, 9 L Ed 421, 68 SC 355, reh. den. 33 U.S. 834, 10 L Ed 1118, 68 SC 457, gave authority for the plaintiff's contention that the filing of the false and misleading affidavits in the earlier cases, as well as the actual filing of the plea of the statute of limitations and the affidavits filed in furtherance of the said plea gives rise to a cause of action at the time damage occurs because of the efforts of the conspirators. In the *Johnson* case, the Third Circuit was addressing itself to a conspiracy involving misconduct by several defendants who were engaged in a "general conspiracy to debase the administration of justice" with reference to specific pieces of litigation in the Middle United States District

Court in Pennsylvania. The indictment alleged that the conspiracy existed over a period of 14 years.

Further, in the case of *Maclaskey v. Mecartney, et al*, reported at 58 NE 2d 630, the Illinois Supreme Court upheld the plaintiff's right to sue the defendants based on the allegations of conspiracy that the defendants had engaged in a conspiracy to injure the plaintiff by filing certain documents and pleadings in a court proceeding in Cook County, Illinois which included innuendo laden interrogatories. The similarity in the *Maclaskey* case and the instant case is based upon the filing of documents in court to injure the plaintiff. The documents in the *Maclaskey* case were filed in a separate proceeding and Mrs. Ethel Maclaskey sued Newell Mecartney and William Kerts for filing the documents. Mrs. Maclaskey's suit was in a separate proceeding and was based upon the fact that defendants had filed defamatory statements in another proceeding in another court.

The proceeding in the *Maclaskey* case was for a conspiracy to libel and slander. In the instant case, there is a similarity in that the earlier cases dealt with simple libel and slander, but the defamation similarity ends there. In the instant proceeding the defendants are being sued for conspiring against the plaintiff to achieve not only the destruction of her business but the loss of her chose in action and right to sue the Retail Credit Company, not for conspiring to libel.

The Illinois Supreme Court in the *Maclaskey* case held that the filing of documents in court in furtherance of a conspiracy was actionable and the

court held in that case, addressing itself to the statute of limitations issue raised by the defendants as follows:

> "The complaint alleged that all the libelous acts were committed pursuant to a conspiracy formed by defendants. The statute of limitations did not commence to run against any of the alleged libelous acts *until the commission of the last overt act done in pursuance of the conspiracy.*" (emphasis supplied) *Maclaskey v. Mecartney*, 324 Ill. App. 498, 58 NE 2d 630 (1944).

Some of the courts interpreting the United States Supreme Court's ruling in the *Breckinridge* case (*supra*) have held that there is a requirement that a plaintiff in an action based on 42 *USC* §1985(3) demonstrate membership in a definable class. This is not to say that every 42 *USC* §1985(3) action should be a class action, but it appears that the courts have felt that there should be a class based animus for an action to be maintained under this section. *Cameron v. Brock*, 473 F 2d 608 .

Although plaintiff does not necessarily agree with the holdings of these courts stating that there must be membership in a class before an action is maintainable under 42 *USC* §1985(3), since on the face of the statute it is stated:

> In any case of conspiracy set forth in this section if one or more persons engaged therein do, or cause to be done, an act in furtherance of the

> object of such conspiracy, whereby another is injured in his personal property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators . . . 42 *USC* §1985(3).

Plaintiff contends that plaintiff need not be a member of a defined class, however, plaintiff can show the Court that plaintiff is nevertheless a member of such a class which was both established by and discriminated against by the defendant, Retail Credit Company (with the cooperation of the individual conspirators in this case, in the instance of the plaintiff.)

It is the policy of the Retail Credit Company and was at the time that the plaintiff was injured, to require that the investigators employed by the company produce an arbitrary specified amount of "declines". The class declined or rejected reports appears to vary between then and fifteen percent depending on what type of report is requested. The investigators are required, under threat of discharge, to produce between ten and fifteen per cent declines. This, in part, demonstrates that the investigators are acting for their own individual profit when they create the said class.

The fact is established through the deposition of Len O. Holloway, a former Retail Credit employee, which appears at page 160 of the record, pages 8, 9 and 10 of his deposition are particularly interesting on this point.

Mr. Holloway is a fine upstanding citizen of Miami, Florida. He is a veteran who held our nation's highest top secret clearance held by very few members of the Armed Forces.

In his deposition, he states that orders are given by supervisory and managers of staff to require the arbitrary percentages of declines from the reports.

It is interesting to note further that the deposition given by Mr. Holloway contradicts and shows as untrue many of the facts stated by other Retail Credit Company employees who are defendants herein, further establishing a conspiracy, including Mr. Biccum. Mr. Holloway demonstrated that Mr. Biccum's deposition given in the previous case (exhibit A to the answer of defendant) was very incorrect in several important and material aspects and showed further that the deposition of Charles L. Hammond (of record in exhibit B) was untrue and incorrect in many instances. These are filed by defendant in this as case exhibits, having been taken in earlier cases.

The affidavit of William F. Boaz (R-154) shows the class is established by the Retail Credit Company.

Finally, plaintiff proposed in the District Court to show internal communications of the defendant corporation demonstrating that in addition to the Miami and Richmond offices where Holloway and Boaz worked, respectively, that on the west coast of the United States, the defendant company established such a class. Plaintiff was in possession of internal communications of the defendant corporation so proving which are not of record in this case, but which were

part of the Congressional investigations into defendant's activities. Plaintiff can clearly show a national policy of the defendants'.

Having established a class membership, plaintiff feels that she has satisfied every requirement of every court which has ruled on these particular points of law. Plaintiff feels that she can maintain an action under the Civil Rights Acts against the defendants.

III.

Whether The Plaintiff Can Maintain A Civil Rights Action Under The Civil Rights Acts Where Most Of The Defendants Were Employees Of Another Defendant Where All Of The Conspirators Acted For The Individual, Separate And Distinct Benefit Of Themselves, Separately.

The defendants are expected to raise the question of whether they have immunity from a suit under the Civil Rights Acts for a conspiracy because they all worked for the same individual corporation. The defendants' position appears to be that since they all received a pay check from the corporate defendant, Retail Credit Company, they can be released from liability.

Of course, it is well settled and Hornbook Law that if a corporation and its individual employees can individually profit by engaging in a concerted course of action their actions can constitute an actionable conspiracy.

Defendant Hammond left the employ of the corporate defendant in May 1964 as is shown by his answer to plaintiff's interrogatory number 2e (R-120). Obviously he could conspire with his former employer and others. Defendants may not be heard to say that Hammond's acts in 1970 and thereafter were the acts of the corporate defendant. After all, these later overt acts were the very acts which denied plaintiff her day in court.

In the instant case, it is alleged that the employees and non-employees conspired among themselves as well as with the corporation. The allegation is that the individual employees and the non-employee Hammond, conspired by their own acts among themselves and with the corporation and further that they conspired without the corporation's directions. These are two separate causes of action as set forth in the complaint. (R-110).

It is the law that if a corporation and its agents or employees are acting other than in their normal capacities or if they are acting for themselves that they are subject to an action for conspiracy.

In this case, the defendant corporation Retail Credit has denied that they were guilty of any conspiratorial activity or that they directed their employees to act in any illegal or unlawful way. This is their position. If this is so, then it gives rise to an inference that the employees were not acting according to their instruction given them by the defendant corporation but were acting on their own. This would make them acting without their normal capacities and consequently obviously liable under the above statement of the law (see answer of defendant Retail Credit Company R-111).

In the instant case, the defendants were acting for their own personal benefit, and in the particular instances of Hammond, Biccum and Pittman, there is no doubt but that they were acting for their own personal benefit.

The other individual defendants worked with the last named defendants for the benefit of the last named defendants as well as themselves. The corporate defendant acted for its individual benefit.

If, as the corporate defendant has answered, it did not direct its employees to act in the manner alleged in the complaint, and if, as set forth in the answers of the various parties defendant to interrogatories number 13 and 16 propounded by the plaintiff, none of the defendants were ever directed or ordered by Retail Credit Company to act in the way that they did, then it must be presumed that they were acting in the separate capacity of an individual and not according to the corporate purpose. In any event, they would certainly be liable for any conspiracy that they perpetrated outside of their corporate duties.

The interrogatories appear at pages 53 through 77 of the record, and answers to them appear at pages 112 through 120 of the record.

The collation of the questions propounded by the plaintiff and the answers given by the defendants sounds like responses of some of the convicted Watergate conspirators. The reading of the answers, as evasive as they are, would be humorous if the plaintiff had not been so tragically injured.

For instance, the answers of Biccum at page 2 of his answers (R-112) state at interrogatory #6 "although I have no clear recollection of it." Later, at the answer to interrogatory #7 the answer is begun "so far as I can recall or determine". He follows with his inability to understand questions and many of his answers throughout the rest of the answers to interrogatories are rife with his inability to remember or are filled with no present recollection. The answers to interrogatories given by G. O. Pittman which appear at pages 113 and 114 of the record are full of the lack of his "present recollection". The answers of J. W. Miller are scarcely less satisfactorily expressed, but are more voluble, and appear at page 116 of the record. Besides nominating himself for sainthood in his answers to interrogatories which begin at page 117 of the record, defendant Grobe begins most of the answers or includes later in the answers given by him the fact that he does not recall. And so it goes in the rest of the answers to the interrogatories. There is no doubt but that the defendants' memories serve them best when they are signing and executing affidavits with definite averments which are designed to keep plaintiff from being able to litigate.

In the instant case, if the defendants were acting for their own personal benefit, as is alleged in the complaint, and the instances of perjury committed by the defendants further given rise to the presumption that they were acting in their own individual benefit, there is no doubt that they are liable, individually.

If they were acting without the corporate authority there is no doubt that they are individually liable.

All the defendants would have been liable for the perpetration of a libel, personally, except the employees of the Memphis office. Therefore, their activities and actions can only be interpreted and presumed to be actions undertaken for their own personal benefit.

There is sound authority that individual employees of a corporation can be subject to an action for conspiracy if they are acting for their own personal benefit. *May v. Santa Fe Trail Transportation Company* (Kan) 320 P 2d 390; *Bliss v. Southern Pacific Company* (Ore) 321 P 2d 324.

Additionally, in the case of *Nelson Radio & Supply Company, Inc. v. Motorola, Inc.* (5 CCA), a 1952 case reported at 200 F 2d 911, an excellent and clear statement of the above mentioned rule is given by the Fifth Circuit. The *Nelson* case was a civil action brought under the Sherman Anti-Trust Act to recover damages arising out of the alleged conspiracy to injure the plaintiff, a distributor of the defendant company. It was there alleged that the conspiracy existed between the defendant corporation, its president, sales manager and "its officers, employees, representatives and agents who have actively engaged in the management, direction and control of the affairs and business of the defendant." The Fifth Circuit upheld the dismissal of the complaint but gave an excellent explication of the rules relative to corporate conspiracy with employees. The Court went on to say that it should be alleged affirmatively, expressly or otherwise, that the officers, agents and employees were actuated by motives personal to themselves in order to maintain a suit for conspiracy against the corporation and its

employees. In this case we have demonstrated this condition, it is alleged in the complaint and it is conclusively shown by the active scrambling of the defendants to cover their tracks throughout the course of this conspiracy.

IV.
Whether A Suit For A Conspiracy Which Damages An Individual May Be Brought Before Damage Occurs.

Another threshold question which must be determined and is of moment on this occasion of appeal, is whether the plaintiff could have brought her action in this case prior to the final determination that she was unable to proceed for the initial injury, which final determination was made by the Court of Appeals on February 20, 1973 as mentioned above. The question may arise as to whether the damage occurred when the District Court rendered summary judgment in the first Mary Wilson case (April 23, 1970) or when the Court of Appeals upheld that ruling on or about January or February 1971 upon rehearing, the original order having been withdrawn, or whether damage occurred in the second Mary Wilson case on the 16th of August, 1972, or whether the damage occurred to plaintiff when this Court affirmed the ruling of the District Court in the said second Mary Wilson case on February 20, 1973.

In any event, it is clear that the damage occurred on one of these occasions and all these occasions occurred in the next six years preceding the filing of the lawsuit in this appeal. The general Mississippi stat-

ute of limitations of six years applies, and the plaintiff has brought her action within that time.

One of the requirements for being able to bring an action under the Civil Rights Acts, and particularly under 42 *USC* §1985(3) is that there actually be an injury to person or property. *Breckinridge* (*supra*); *Miles v. Armstrong* (CA Ill 1953) 207 F 2d 284; *Grisom v. Logan* (DC Calif. 1971) 334 F Supp 273; *Huey v. Barloga* (DC Ill 1967) 277 F Supp 864; *Providence Journal Company v. McCoy* (DC R.I. 1950) 94 F Supp 186, aff. 190 F 2d 760, *cert den.* 72 SC 200, 342 U.S. 894, 96 L Ed 669.

All of the above cases, including the landmark *Breckinridge* case, and incidentally, the *Hardyman v. Collins* case, overruled in part by *Breckinridge*, universally hold that the damage must occur before a conspiracy is actionable under this section. In fact, it is the general law that a conspiracy may not be sued upon and the conspirators held liable for damages unless damages have occurred.

Dean Prosser expresses the rule in his 1954 edition thusly:

> "On the one hand, it is clear that the mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime; and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort. "*The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff*". It is only

> where means are employed, or purposes are accomplished which are themselves tortious that the conspirators who have not acted but have promoted the act will be held liable." (emphasis supplied) Prosser, *Law of Torts* at 260.

Dean Prosser cited the following cases in support of his pronouncement as expressed immediately above: *Beechley v. Mulville*, (1897) 102 Iowa 602, 70 NW 107, 71 NW 428; *Delz v. Winfree* (1891) 80 Tex. 400, 16 SW 111; *Robertson v. Parks* (1892) 76 Md 118, 24 A 411; *City of Boston v. Simmons* (1890) 150 Mass 461, 23 NE 210; *Van Horn v. Van Horn* (1894) 56 NJ L. 318, 26 A 669; *James v. Evans* (3 CCA 1906), 149 F 136, 140; *White v. White* (1907) 132 Wis. 121, 111 NW 1116; *Hutton v. Waters* (1915) 132 Tenn. 527, 179 SW 134; *Hudgens v. Chamberlane* (1911) 161 Cal. 710, 120 P 422.

And the list could go on ad infinitum. It seems indisputable and the universal authority that a conspiracy must first cause damage before it can become actionable.

The question which must be answered by this Court in order to determine several of the other issues is whether the plaintiff could have brought her action for conspiracy prior to being injured by the conspiracy.

Plaintiff submits that she could not have brought the lawsuit until it was finally determined, by each and every avenue, that she could not prevail and that the conspiracy had been successful. Plaintiff filed her first suit and was denied a trial on the merits. Plaintiff filed her second suit under the savings to suitors

clause of the *Mississippi Code* (formerly §744 of *Mississippi Code* of 1942, as amended, as cited to the Court of Appeals in the previous appeal) and this Court held that she was not entitled to relief at that time.

Plaintiff submits that she was finally damaged when she had exhausted all possible remedies to secure relief based upon the libel, and that this cause of action could not have been brought until she had exhausted those remedies. This action was brought after she had exhausted those remedies.

V.

Whether The Doctrine Of Collateral Estoppel Applies To Bar Such An Action Against The Credit Reporting Company And/or Its Employees Who Conspired Each Individually For Each Individual's Separate Benefit Where The Plaintiff Has Previously Sued The Credit Reporting Company Alone In Its Individual Corporate Capacity For A Libel.

Plaintiff has previously discussed above the relationship of the corporate defendant and the separate employees and the non-employee, Charles Hammond, in their activities and will not discuss that in this portion of the brief.

This portion of plaintiff's brief will address itself to the doctrine of collateral estoppel as it involves this suit.

In its opinion, R-161, the District Court held that the doctrine of collateral estoppel as applied by the Mississippi Supreme Court and the Fifth Circuit in the respective cases of *Garraway v. Retail Credit,* 141

So 2d 727 (*Garraway II*) and *Mary Wilson v. Retail Credit,* 474 F 2d 1260 (Mrs. Wilson's second suit against the corporate defendant) was controlling in this case.

The plaintiff submits that the District Court was operating under gross misapprehension of the doctrine of collateral estoppel particularly as applied in *Garraway II* (*supra*). The Fifth Circuit at 474 F 2d 1260 held that since Mrs. Wilson had previously sued the individual corporate defendant alone and lost that she could not again litigate under the Mississippi Code savings to suitors section stating: "We think that the Mississippi doctrine of collateral estoppel is dispositive." *Wilson* at 1260. In its footnote #2, the Fifth Circuit stated:

> "The instant complaint is grounded in products liability, misrepresentation and deceit, invasion of privacy, and interference with property and contract rights. Regardless of the disingenuous characterization, no new facts are alleged in the present litigation which were not already decided by the previous suit." *Wilson II* at 1260.

The Fifth Circuit Court of Appeals in *Wilson II* felt the statute of limitations question which had been conclusively determined in the previous suit, *Wilson v. Retail Credit Company,* 430 F 2d 1053 (5 CCA 1971) controlled. Accordingly the doctrine of collateral estoppel did, in fact, apply to that case. The plaintiff in that case had previously litigated the statute of limitations question and it was no longer available to the plaintiff even if the plaintiff alleged new grounds

of action which came under a different statute of limitations of greater length. The question in the earlier two Wilson cases of whether or not the fraudulent concealment of the cause of action tolled the statute of limitations. The District Court in both instances and the Fifth Circuit in both instances held that there was no legal duty for the defendants to disclose to the plaintiff the fact that she had a cause of action. *Wilson* cases (*supra*).

The law of the case it would seem to be then was that the defendants were acting lawfully when they misled the plaintiff about the existence of her cause of action for libel.

It follows, then, that the unlawful objective of the conspiracy, which was achieved, was achieved by lawful means. This is the first type of conspiracy set out hereinabove.

In the instant case, not only are the parties different but the cause of action is different, and could not have possibly been determined in the previous cases.

In fact, plaintiff's motion to implead the individual defendants in *Wilson II* (*supra*) was denied *without prejudice* by the District Court. A copy of the relevant portion of the District Court's opinion in that earlier case is attached to the affidavit of attorney W. Roberts Wilson, Jr. in the form of exhibit A attached to said affidavit which is at page 145 of the record. At page 148-2 of the record the District Court stated "accordingly, the motion for leave to amend is denied *without prejudice.*" [emphasis supplied]

Again, it is of record in this proceeding that plaintiff attempted to bring in the defendants in the earlier Mary Wilson case at page 3 of the District Court's opinion of this case which begins at page 161. The District Court states in its opinion in that case that the same Court denied the motion for leave to amend to bring in the individual defendants without prejudice. Further, and finally, the District Court mentions on page 7 of its opinion beginning at page 161 of the record that the plaintiff's attorney's affidavit proves the same thing.

It is incomprehensible that the District Court, having previously denied, without prejudice, plaintiff's attempt to implead the individual employees and add the conspiracy count would invoke the obviously inapplicable doctrine of collateral estoppel to bar this suit. The Court's employment of this doctrine in this case is absolutely erroneous.

The doctrine of collateral estoppel has been perhaps more narrowly applied by the Courts of the State of Mississippi than most other jurisdictions.

In fact, in the *Garraway* case (*supra*) the Mississippi Supreme Court held that Mrs. Garraway and Mr. Garraway who had previously sued Retail Credit for discovery in a Chancery Court proceeding under a pure bill of discovery were not precluded from filing a separate civil action for damage later in the Circuit Court of Adams County, Mississippi.

The fact situation in that case was stated by the Supreme Court of Mississippi at 141 So 2d 727, 729 thusly:

"While the discovery suit was pending on appeal, but after the Chancery decree, Mrs. Garraway filed the three separate libel suits in the Circuit Court of Adams County, against Retail Credit and four other defendants. She alleged that the Credit Bureau, Inc. of Georgia (Credit Bureau) is a subsidiary of Retail Credit and the defendants, Clarence Bowers, Johnny Weeks and Jack H. Beattie, were agents and employees of the defendant corporation. In 1951 and 1952 plaintiff was an employee of the defendant corporation in Adams County, Mississippi and thereafter opened her own collection service business, and later a credit reporting business. Plaintiff has always been of good moral character and reputation in the community, but in 1959 *defendants conspired together to injure, discredit, and destroy her character and reputation, and in carrying out such conspiracy* circulated without any proper investigation . . . (citing instances of libel) (emphasis supplied)

. . . To this declaration all of the defendants pleaded that the judgment of this Court in *Garraway* v. *Retail Credit Company* [*Garraway I*, 126 So 2d 271, parenthetical supplied] constituted *res judicata* and collateral estoppel on the issues of malice and bad faith as related to the qualified privilege. The Circuit Court sustained these pleas.

[1, 2] First. Collateral estoppel is a doctrine which operates following a final judgment to establish conclusively a matter of fact or law

for the purposes of a later law suit on a different cause of action between the parties to the original action. Because of its application to a different cause of action from that involved in the first suit, the doctrine is broader than the "merger" and "bar" aspects of *res judicata*. *Nevertheless, the restriction of collateral estoppel to issues actually litigated and necessarily determined in the first action circumscribes operation of the doctrine more closely than "merger" or "bar" which may effect matters which could have been litigated.* (emphasis supplied) 141 So 2d at 730.

The Mississippi Supreme Court went on to hold that the doctrine of collateral estoppel did not apply and the case was subsequently settled for a substantial sum of money once Retail Credit and its co-defendant employees, accused of a conspiracy, were placed in the posture of having to go before a jury.

It is the established policy of the courts of the State of Mississippi, as well as the courts of the United States that the doctrine of collateral estoppel does not apply in law suits such as the instant proceeding.

In the case of *Johnson v. Bagby*, the Mississippi Supreme Court, addressing itself to the doctrine of collateral estoppel, as laid down in *Garraway II*, stated the rule as follows:

"This court, as is true in other jurisdictions, has relaxed somewhat the application of the doctrine of *res judicata* by enabling litigants to use the doctrine of collateral estoppel, but

there are still certain basic requirements which this Court has held must be present and operating before the doctrine of collateral estoppel can be applied as a bar to a subsequent action based upon a judgment in a former case.

[1] This Court, speaking through Justice Ethridge, pointed out in *Garraway v. Retail Credit Co.*, 244 Miss 376, 141 So 2d 727 (1962), that "[c]ollateral estoppel is a doctrine which operating, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later law suit on a different cause of action between the parties to the original action." Here is presented the first basic requirement essential for the operation of collateral estoppel, which is that the parties to the original action must be the same parties to the subsequent action. In collateral estoppel we have relaxed the rule under *res judicata* and we have permitted a different cause of action to be litigated between the parties, but up to this time we still hold that it is necessary that the parties to the subsequent action must be the same as those in the prior action.

To the same effect see *Bush Construction Company v. Walters*, 179 So 2d 188; *Sanders v. State*, 242 So 2d 412; *C. I. T. Corporation v. Turner*, 157 So 2d 648; *Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 141 So 2d 200.

The above and foregoing authorities are the law in Mississippi and quite distinctly and emphatically

deny the position taken by the District Court, in this case, in the lower court's opinion.

There are some courts which have applied the doctrine of collateral estoppel in civil rights suits which attempted to relitigate criminal proceedings which had already gone to judgment and have been affirmed on appeal in state courts.

However, the weight of authority is to the effect that the doctrine is improperly employed thusly. The weight of authority is that the doctrine of collateral estoppel does not normally apply to a civil rights suit, *even if the facts have been essentially litigated in the state court in a separate proceeding.*

In this case, the doctrine does not apply for several reasons, not least among which is the fact that the cause of action did not arise until damages occurred, which was after the cases upon which defendants would base their plea of collateral estoppel had terminated in the Fifth Circuit Court of Appeals. Further, there is no identity of parties save with the possible exception of the corporate defendant Retail Credit, which is now sued for a separate tort, not the earlier tort that it has never denied, and it, consequently, may not be excused on the doctrine either. Additionally, there is no identity of the thing sued for, there is no identity of the theory of action and finally, there was obviously no chance for the plaintiff to litigate this cause in the earlier action, inasmuch as her attempt was resisted by the defendant and denied without prejudice, as set forth above.

In the following cases, the federal courts have addressed themselves to the question of collateral estoppel and have held that the doctrine should not be applied to a civil rights complaint in a federal court: *Kauffman v. Moss*, 420 F 2d 1270 (3 CCA 1969); *Bricker v. Sceva Speare Memorial Hospital*, 339 F Supp 234 (1972), DC NH, citing *Frazier v. East Baton Rouge School Board*, 363 F 2d 861 (5 CCA 1966); *Burchette v. Bower*, 355 F Supp 1278 (DC Ariz. 1973)

From a fair reading from the above federal authority there is no doubt that the federal courts have generally adopted the policy that a reasonable doubt as to what was decided by the prior judgment should be resolved against using it as an estoppel.

The Third Circuit stated the rule thusly:

> "Reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel (420 F 2d at 1274, citing *Northern Oil Company v. Socony Mobil Oil Company*, 368 F 2d 384, 388 (2 CCA 1968)

Professor Antieau comments thusly on the employment of the doctrine of collateral estoppel to bar a suit under the Civil Rights Acts:

> "Reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel. Prior state court proceedings concerning the same general subject matter can not by themselves require dismissal of a civil rights case (citing *Mulligan v. Schlachter* (1968) CCA 6, 389 F 2d 31 and *Burchette v. Bower* (*supra*)

The Court of Appeals for the Ninth Circuit has ably remarked: "If a successful state prosecution based upon the use of information obtained by violating the defendants' constitutional rights, could bar a civil rights action against the police for violating his rights, either by analogy to the law of malicious prosecution or on theories of *res judicata* or estoppel by a judgment, the Civil Rights Acts would, in many cases, be a dead letter." (citing *Nay v. California* (1971) CCA 9 439 F 2d 1285, 1288)

Other courts have indicated that collateral estoppel is not to be applied recklessly in civil rights actions. (citing *Ames v. Vavreck* (1973 DC Minn) 356 F Supp 931)

Federal Civil Rights Acts, Antieau, §84.1

It seems clear, then, that this case is definitely not one for the application of the doctrine of collateral estoppel. Absolutely none of the elements are present, and the decisions of the Supreme Court of the State of Mississippi have required that each and every element be present for the application of the doctrine. Additionally, the federal courts have repeatedly held that the doctrine is not to be applied except under the most unusual conditions.

This case is emphatically not a case for the application of the doctrine, under any interpretation. The defendant Retail Credit could, under a strained and tortured interpretation of the doctrine perhaps be excused from the law suit, but it is inconceivable that the

doctrine could be so tortured since the damage did not occur until the previous suit had been finally litigated to an end.

In any event, should this court decide that Retail Credit is acting under color of law, or was acting under color of law at the time due to the judicially granted privilege which made them, in effect, immune to suit, as conclusively demonstrated in *Garraway I* (*supra*) then there is no need to prove a conspiracy and the 42 *USC* §1983 action certainly could not have accrued to the plaintiff until the damage was done. Therefore, there is one more reason why the doctrine can not apply, since the cause of action arose after the earlier law suit was actually litigated.

VI.

Whether The Defendants Were Acting Under Color Of Law Within The Terms Of 42 *USC* §1983.

The plaintiff has already advanced the argument that the defendants were acting under color of law above and will not further belabor the point here.

VII.

Whether 42 *USC* §1986 Applied To The Individual Defendants In This Case And Whether The Statute Of Limitations In 42 *USC* §1986 Commences To Run At The Time The Damages Have Been Finalized.

Plaintiff simply submits by way of argument under the preceding question the fact that the one year statute of limitations contained in 42 *USC* §1986 would

not have expired at the time of the filing of the instant suit since the damage did not occur until February 20, 1973 and consequently, that there could have been no damage until that date and this suit was commenced in December of the same year, less than one year after the occurrence of the damage. The statute provides that the suit must be for "all damages caused by such wrongful act." 42 *USC* §1986.

The rights protectable under this section are the same as those that are safeguarded under 42 *USC* §1985 and must be ones arising under the federal Constitution or laws. *Miles v. Armstrong* (1953, CCA 7) 207 F 2d 284.

It is elementary that 42 *USC* §1986 by its language extends its protection only to "the party injured".

It is interesting to note that there is no requirement of state action or color of law by the language of §1986 which authorizes suit against "every person".

It only remains for this Court to determine whether or not plaintiff's damage occurred as alleged on February 20, 1973 and whether the statute began to run at that time. If the statute began to run in February of 1973, then this suit was timely brought under 42 *USC* §1986.

VIII.

Whether The Pendant State Claim Of Conspiracy Is Subject To Being Dismissed Under The Doctrine Of Collateral Estoppel.

Plaintiff submits that if the doctrine of collateral estoppel does not apply to the claims set forth under the

Civil Rights Acts then by the same token it certainly should not apply to the pendant state claim for conspiracy.

If this Court holds that the plaintiff does not have a cause of action under the Civil Rights Acts, then it follows that the pendant claim under the state common law must be dismissed. It would then be for the plaintiff to bring her law suit in the state courts of the State of Mississippi since there is not complete diversity of citizenship that plaintiff, having moved to Mobile, Alabama, now being a resident of the State of Alabama where defendant Drone resides.

Plaintiff urges that if this Court determines that there is no cause of action stated under the Civil Rights Acts that the Court must then, it follows, determine that the District Court and this Court as well, were and are without jurisdiction, and that the District Court and this Court lack jurisdiction of the pendant claim under the terms and conditions of the diversity statute since at the time of the commencement of the law suit the plaintiff was a resident of Mississippi as are several of the co-defendants, and the plaintiff is now a resident of the State of Alabama as is defendant Drone.

This would leave plaintiff to file her law suit in the state courts of the State of Mississippi and prosecute it there under the pendant state claim.

Respectfully Submitted,

MARY ELIZABETH WILSON

William Roberts Wilson, Jr.

PLAINTIFF WILL BRIEF OTHER POINTS ADVANCED AS DEFENSES UPON WHICH THE LOWER COURTS OPINIONS HAVE NOT TOUCHED IF THE SAME IS DESIRED BY THIS COURT.

APPENDIX

In the Appendix are the opinions of the lower Courts. The opinions mentioned in footnote 1 of the Fifth Circuit's opinion in this case are not companion cases, but two of them are cases the decisions in which affirmed that Plaintiff had been damaged.

FIRST AMENDED COMPLAINT

In the United States District Court for the
Southern District of Mississippi
Southern Division

MARY ELIZABETH WILSON,
Plaintiff,

versus NO. 72(S)-304(R)

ROBERT W. BICCUM, J. W. MILLER, C. A. GROBE, G. O. PITTMAN, J. J. CURTIS, T. E. DRONE, CHARLES L. HAMMOND, BOBBY GANN, DOE 2, DOE 3, DOE 4, DOE 5, DOE 6, DOE 7, DOE 8, DOE 9, and DOE 10, all individuals, and RETAIL CREDIT COMPANY, INC., ROE 1, ROE 2, ROE 3, ROE 4, ROE 5, ROE 6, ROE 7, ROE 8, ROE 9, ROE 10, Bodies Corporate,
Defendants.

Comes now the Plaintiff, Mary Elizabeth Wilson, by and through undersigned counsel; and institutes this, her suit, against the parties defendant, named and unnamed, and would show unto the Court the following facts, to-wit:

I

Plaintiff brings separate and several actions and causes of action against the various named parties defendant, as well as the unnamed parties defendant, individual and corporate, and would seek judgment of this Honorable Court, jointly and severally against them and each of them for the matters and facts hereinafter stated and alleged.

Plaintiff seeks judgment in joint and in several against all of the various parties defendant based upon the following causes of action and facts, to-wit:

Plaintiff is an adult resident citizen of Jackson County, Mississippi, residing at the Longfellow Apartments in the City of Pascagoula therein.

The Defendant, Robert W. Biccum, is an adult non-resident of the State of Mississippi and may be served with process at his place of employment, which is the Retail Credit Company office at 1600 Peachtree Street, in the City of Atlanta, Georgia.

The Defendant, J. W. Miller, is a non-resident of the State of Mississippi, who may be served with Service of Process at his business address which is 5800 Old Peachtree Street in the City of Chamblee, Georgia.

The Defendant, C. A. Grobe, is an adult non-resident of the State of Mississippi, who may be served with process at his business address, which is the Memphis Retail Credit Company office, 5050 Poplar Ave. in the City of Memphis, Tennessee.

The Defendant, G. O. Pittman, is a non-resident of the State of Mississippi, who may be served with service of process at his business address, which is 1600 Peachtree Street in the City of Atlanta, Georgia.

The Defendant, J. J. Curtis is a non-resident of the State of Mississippi, who may be served with service of process at his usual business address, which is the Tallahassee Retail Credit Company office, 501 North Duval Street in the City of Tallahassee, Florida.

The Defendant, T. E. Drone, is an adult non-resident citizen of the State of Mississippi, who may be served with service of process at his usual business address, which is the Montgomery Retail Credit Company office, 472 South Lawrence Street, City of Montgomery, Alabama.

The Defendant, Charles L. Hammond, is an adult resident citizen of Bolivar County, and may be served with process of this Honorable Court at his usual and customary place of employment which is the Shaw High School in Shaw, Mississippi.

The Defendant, Bobby Gann, is an adult non-resident of Jackson County, Mississippi and may be served with process of this Honorable Court at Walnut Road in Starkville, Mississippi.

The Defendant, Retail Credit Company, a body corporate, is a foreign corporation upon whom service of process may be had by process upon B. A. Coley, resident agent for service of process whose address is Executive North Building, 802 North State Street, Jackson, Mississippi.

This Court has jurisdiction of this controversy under Title 42, *United States Code*, Sections 1983, 1985 and 1986, without regard to the citizenship of the parties or the amount in controversy.

II

Your Plaintiff would show unto the Court that between the years 1959 and 1970, and perhaps thereafter that the Defendants, and each of them, entered into various and sundry artifices, deceptions, collusions, and other nefarious practices, all in conspiracy with one another, for the purpose of precluding her discovery of their other tortious acts against her, which acts of conspiracy, not only in themselves constitute a separate and distinct tortious conduct against your Plaintiff, but which actually deprived her of knowledge of her rights of action against the Defendant, Retail Credit Company and denied her the opportunity to have her wrongs redressed through processes of law.

Plaintiff would show unto the Court that she has been the victim of a conspiracy which achieved an unlawful end and result by the use of questionably lawful means.

III

Plaintiff will show unto the Court that the conspiracy existed and that the said series of events leading up to and culminating in her most recent injuries because of the said conspiracy began when defendant Charles L. Hammond prepared and does so admit preparing, in 1963, a credit and character report on the Plaintiff containing outlandish descriptions of her, said report being prepared at the direction and in-

stance of the named corporate defendant herein, Retail Credit Company. Plaintiff takes emphatic issue with the nature and substance of the said report, however, Plaintiff would affirmatively say unto the Court that Plaintiff does not sue for the defamation contained in the said report.

Plaintiff sues the Defendants for the conspiracy which deprived her of several valuable Federally protected rights.

Plaintiff would show unto the Court that the effect of the conspiracy was to deprive her of (1) equal protection of the laws, and; (2) equal privileges and immunities under the law, and (3) several other federally protected rights including the right to make contracts to pursue her lawful and chosen profession, and finally, and perhaps most important, the conspiracy deprived her of the right to maintain an action in Court and the fundamental right of citizenship to resort to the Courts for protection of ones liberty, property and reputation.

Plaintiff would show unto the Court that by and through several acts of secreting her reports and file beyond the borders of the State of Mississippi to avoid judicial process, as is indicated by admissions on file herein, and by several lies and deceptive representations to your Plaintiff, and other activities which will be shown unto the Court upon the discovery thereof, as well as the activities and acts hereinbelow indicated, constitute the gravamen of the conspiracy.

Plaintiff would show unto the Court that the co-conspirators acting as indicated hereinbelow, denied

that credit reports had been prepared on her, and they further contacted and intimidated the recipients of the false reports with threats of the obligations of the said recipients under the Retail Credit Agreement for services, a true and correct copy of which is attached hereto as Exhibit "A", and incorporated herein by reference as if fully copied in words and figures herein, and that they did act as follows to conspire to her detriment and the ultimate destruction of her business and her ability to sue them in Court, inasmuch as they successfully concealed her rights of action against the parent company, Retail Credit Company, and themselves, until the statute of limitations, as applied by the United States District Court and the Fifth Circuit Court of Appeals had expired, in former suits filed against the retail Credit Company by her.

Plaintiff would show unto the Court that Plaintiff has been successfully denied her day in Court by the conspiracy since the conspiracy, acting by questionable lawful means, achieved the grossly unlawful purpose of the said conspiracy which was to deny her, among other federally protected rights, the right to her day in Court.

The course of events which transpired, as it is known to your Plaintiff, took the following chronological order, to-wit:

1. Biccum, co-defendant herein, wrote co-defendant Grobe a letter on October 25, 1963, which letter was sent from Atlanta, Georgia to Memphis, Tennessee, directing the said Grobe to take certain security measures to prevent Mrs. Wilson from dis-

covering further matter about her Retail Credit Company report file or other records. Said Biccum by the said letter to said Grobe intended to preclude further breaches of security, had any occurred, and to prevent any future breaches of security. Said Grobe acquiesced in the said conspiracy.

2. Biccum, co-conspirator, also wrote a letter on October 25, 1963, to co-defendant Miller, in the Retail Credit Company office in Jackson, Mississippi, suggesting the same that he had suggested to co-defendant Grobe, but further indicating that the said Miller should and ought to determine where the breach of security had occurred. Said Miller acquiesced and actively participated in concealing the said cause of action, as did Grobe.

3. On November 12, 1963, Biccum, again wrote to Miller, anticipating the possibility of a law suit by the Plaintiff against the Retail Credit Company and the said Biccum directed Miller and others in the Jackson, Mississippi office to undertake preliminary steps to substantiate the false charges they had made, and further directing by telephone calls at the same time, and other communications, that all of the Mississippi offices at that time take a special precaution relative to protecting themselves from discovery in their tortious conduct by the Plaintiff.

Further, Biccum had already removed the Plaintiff's file beyond the boundaries of the State of Mississippi in anticipation of possible legal action, as is admitted by admissions on file herein.

4. On April 10, 1964, Biccum directed said Miller to gather information that he and other unnamed and named conspirators herein had, and to send all the information and files that said co-conspirators had relative to the Plaintiff to the home office of Retail Credit in Atlanta, Georgia, thereby removing the documents from the jurisdiction of the State of Mississippi, which was done solely and for the singular purpose of removing the said documents from the jurisdiction of the Courts of the State of Mississippi, for the purpose, as admitted in admissions on file herein, of concealing the said documents. Miller and the others did so follow through perpetuating and perpetrating the conspiracy.

On April 10, 1963, said co-defendant Grobe and co-defendant Pittman and co-defendant J. J. Curtis and co-defendant Biccum variously, discussed the Plaintiff's attempts to determine the tortious conduct of them and all of them, by telephone, and concluded certain further measures they should undertake to prevent her learning further about any tortious conduct they had engaged in.

5. Further, on April 10, 1964, co-defendant Curtis wrote co-defendant Biccum, sending a copy of the said letter to co-defendant, J. W. Miller, giving a narrative of a conversation with the Plaintiff, which narrative contained indicia of the nature of the course of conduct they were taking against your Plaintiff to conceal the course of action, including the denial of one Johnny Miller, co-defendant herein, that they had made a report on her.

Further, as a post script to the said letter of April 10, 1964, sent by the said Curtis, the said Curtis indicated that he had led the Plaintiff to believe that he was taking affirmative steps to remedy any improper situations which might exist with regard to her credit report, thereby misleading the Plaintiff into a sense of security relative to the need for action on her part.

In the same letter, said Curtis requested further instructions from said Biccum relative to further "handling" of the Plaintiff's case.

6. On or about May 5, 1964, co-defendant Drone, contacted and conferred with co-conspirator Biccum for further instructions and devices relative to handling the concealment of Plaintiff's cause of action from Plaintiff.

7. Prior to the most recent conspiratorial acts set forth hereinabove, on February 7, 1964, co-defendant Pittman wrote to co-defendant Miller transmitting the papers of the Plaintiff back to the Jackson, Mississippi office from Atlanta since it appeared that the Defendants had successfully precluded the Plaintiff from proceeding against them, and that the matter was "quiet", thereby furthering the conspiracy of concealing the causes of action from the Plaintiff and concealing other remedies from the Plaintiff.

8. Apparently in the year 1964, in the spring time or early summer, the Defendant, Charles Hammond, reported several visits and telephone calls from the Plaintiff to his superiors for instructions "because she seemed to have some inside information about the nature of his reports" and the said superiors, co-

defendants herein, including named and unnamed co-defendant, advised and conferred with him to further the conspiracy of secrecy.

9. Co-defendant Bobby Gann, on or about January 10, 1967, wrote the Retail Credit Company office in Jackson, Mississippi, writing to co-defendant Drone, indicating that he would not respond to the inquiries of the Plaintiff when she had contacted him that day, and stated that he just listened and made sure that he did not "stick his neck out" and requested directions from the said Drone relative to further handling of the Plaintiff.

Said Gann has since admitted that he had indicated to the Plaintiff on the said occasion mentioned immediately above, that he would contact the Jackson office for the purpose of rectifying any problems she might have, thereby misleading the Plaintiff and perpetuating the said conspiracy.

Co-defendant Gann further has admitted that it is a practice and a policy of the Retail Credit Company to require that their investigators send in a certain number of bad reports, thereby showing the bad faith of the said Retail Credit Company in conducting all of the operations hereinabove set forth and others hereinbelow set forth, and others not yet discovered relative to the Plaintiff, since the Plaintiff was nothing more than a statistic which they required of their inspectors, i.e., one of the required bad reports.

10. Plaintiff would show unto the Court that Defendant Hammond, Biccum and others have executed Af-

fidavits, under oath, filed in law suits pending before this Honorable Court for the avowed admitted and stated purpose of convincing this Honorable Court that the Plaintiff knew or should have known of her cause of action at a time when they were acting affirmatively to conceal the same, and so thereby lead the Court to the conclusion that the Plaintiff's claim was barred by the statute of limitations, all at a time within the last two years, which is the most recent effort on behalf of the conspiracy by the conspirators to bear fruit, which fruit has been born recently in the denial of the Plaintiff's day in Court on her defamation actions.

Plaintiff therefore charges that the Defendants used the law to their own wicked and evil ends, and thereby perverted the course of justice. Plaintiff charges the defendants by the said lawful means, denied her her day in Court, thereby achieving an illegal end.

11. Other overt acts done pursuant to the conspiracy, include by description, but not by limitation; denials by co-conspirators Miller and Hammond that a Retail Credit report had been made on your Plaintiff, such denials being the custom and corporate policy of the corporate defendant, a telephone call from co-conspirator Grobe in the Memphis, Tennessee office to the Legal Department of the Corporate Defendant on or about April 10, 1964, to discuss the Plaintiff because the Plaintiff had made a telephone call to the Memphis office.

Plaintiff contends that the Defendants in this case conspired to prevent her from discovering their highly prejudicial and absolutely unreliable data in said

Retail Credit Company's file on her and the report of September, 1963, although they admitted to the United States Senate in December, 1968, that the credit report was wrong.

Defendants conspired together with purposeful intent to prevent Plaintiff from discovering that the unreliable information existed and that the highly prejudicial and slanderous credit report has been issued, until after the statute of limitations had run and expired and thereby effectively prevented her from having her day in Court on the libel and slander action and other remedies, thereby denying her basic and fundamental rights of citizenship, the equal protection of the laws, and due process of law.

Plaintiff further contends that the conspiracy of the said Defendants was accomplished under color of State Law by and because of the actions of the State of Mississippi, in extending to the Defendant, Retail Credit Company, and its employees, a conditional privilege of secrecy, and that as a result of this conditional privilege and the abuse and misuse of the same, the co-conspirators herein denied effectively to the Plaintiff her day in Court.

Plaintiff shows therefore unto the Court that the Defendants achieved an unlawful and illegal and prohibited end by and through their misuse and abuse of the law of the State of Mississippi.

12. Plaintiff contends further that said Defendants conspired with each other to get Plaintiff's file out of Mississippi so that it could not be subpoenaed if she brought an action in the Mississippi State Courts.

Plaintiff contends that as a result of this conspiracy on the part of said Defendants that she was denied the equal protection of the laws and the equal privileges and immunities under the laws in that she was a victim of intentional and purposeful discrimination by the said Defendants against herself in particular, and all others similarly situated in general, in that said Defendants intentionally and purposefully prevented her from realizing her day in Court which is guaranteed to all citizens who have been aggrieved under the equal protection and equal privileges and immunities clauses of our United States Constitution.

The said Defendants have realized fruit of their conspiracy as recently as August 16, 1972, when this Honorable Court entered an Order of Summary Judgment based on Statute of Limitations denying the Plaintiff the right to sue the said Defendant, Retail Credit Company, for a cause of action, the existence of which was concealed from the Plaintiff by the various parties Defendant action in conspiracy as alluded to hereinabove.

Plaintiff therefore shows unto the Court:

That the Defendants conspired to conceal her cause of action against Retail Credit Company, as is hereinabove set forth.

That the purpose of the conspiracy was to deprive your Plaintiff of the equal protection of the laws and the equal privileges and immunities of the law, thereby denying her her fundamental rights, including her day in Court.

That there was a purposeful intent on the part of all of the said Defendants to so act and conspire, to discriminate against the Plaintiff and prevent her from exercising her rights hereinabove set forth, in particular, and that a greater conspiracy existed which included the Plaintiff among a class of all other persons similarly situated.

That the Defendants acted under the color of State Law, as well as local customs and usage, under the qualified privileged granted by the Mississippi Supreme Court and contracts employed by the Defendants *which allowed them to proceed against their co-conspirators, their subscribers,* who will be named as Defendants herein upon discovery through proper discovery procedures, *they being co-conspirators in perpetuating the web of secrecy preventing the Plaintiff from discovering her cause of action,* under the said agreement of the Retail Credit Company. [emphasis added]

That the Plaintiff was injured in her person and property and in exercising her rights of citizenship, which rights of citizenship are the right to sue and vindicate her name and the right to engage in business and to own property and the right to follow any lawful business and make all proper contracts in furtherance thereof, but most particularly the right to her day in Court, by and through the conspiracy and acts of the Defendant.

Plaintiff therefore shows unto the Court that the Defendants, acting in concerts and together, conspired against her and that she has been injured thereby.

IV

Your Plaintiff would show unto the Court that the conspiracy so entered into by the various named parties defendant did, in fact, hinder and impede her from exercising the said remedies, therefore bearing the fruit of the conspiracy as recently as August 16, 1972, when this Honorable Court entered an Order of Summary Judgment based upon the Statutes of Limitations denying the Plaintiff the right to sue the Defendant, the Retail Credit Company for a cause of action, the existence of which was concealed from your Plaintiff by the various parties defendant action in conspiracy, as alluded to hereinabove.

Your Plaintiff charges the Defendants as named hereinabove with conspiracy and a concerted conspiracy against her.

Plaintiff would show unto the Court that during all the time that the conspiracy existed, that the defendants were action under color of law and under color of law, not only in the State of Mississippi but in the State of Georgia and in the State of Tennessee and in various and sundry other jurisdictions in which their tortious and conspiratorial activity occurred. Plaintiff would show unto the Court that the Defendants were protected by a privilege, known as a defeasible, contingent privilege, and they operated under this privilege with impunity, inasmuch as the privilege, granted by the laws of the State of Mississippi and the other jurisdictions, allowed them to engaged in a course of action injurious to your Plaintiff, in concert and conspiracy with one another, under the protection of the law. Defendants were actually able to deprive

Plaintiff of her rights and legal privileges and other property rights, acting under this color of law.

V

Your Complainant would show unto the Court that the Defendant's conduct, in conspiracy, and in concert, were of such character and nature and of such malicious and wanton and reckless nature that she should be given punitive and exemplary damages, as well as actual and compensatory damages against each of the parties defendant, jointly and severally.

Because of which and all of which the Plaintiff sues and demands damages, both compensatory and punitive of the parties defendant.

VI

SECOND CAUSE OF ACTION

Now for a Second Cause of action, your Plaintiff reavers and realleges each and every allegation as hereinabove set forth and reserving all rights and waiving none, and for a second cause of action, avers that she is entitled to relief and judgment as against the various named parties defendant, to-wit:

Robert W. Biccum, J. W. Miller, C. A. Grobe, G. O. Pittman, J. J. Curtis, T. E. Drone, Charles L. Hammond, and Doe 1, Doe 2, Doe 3, Doe 4, Doe 5, Doe 6, Doe 7, Doe 8, Doe 9, Doe 10, all individuals and Roe 1, Roe 2, Roe 3, Roe 4, Roe 5, Roe 6, Roe 7, Roe 8, Roe 9, and Roe 10, Bodies Corporate, for their tortious conspiring against her as individuals without the direction of

their superiors, and in such manner as even though, had it been under the direction of their superiors, would subject them to liability for conspiracy against your Plaintiff, both under the laws of the State of Mississippi and under the laws of the United States and the Common Law.

Your Plaintiff would show unto the Court that because of acts entered into between the year 1959 and the year 1972, that she was denied her day in Court and was denied her rights as allowed to her under the laws of the State of Mississippi and the United States to proceed against the defendant named herein, The Retail Credit Company, by and because of the conspiracy of the various named parties defendant, named in this, her second cause of action, and your Plaintiff would show unto the Court that the named parties defendant, named in this, her second cause of action, acted in concert together with the common, malicious, and wanton reckless purpose with an intent to deprive and defraud her of all her rights against the Defendant, The Retail Credit Company, for their own mutual benefit and their own individual benefit as well.

Because of which and all of which your Plaintiff sues and demands damages, both actual, compensatory, punitive and exemplary.

VII

THIRD CAUSE OF ACTION

Now, for a third cause of action, your Plaintiff reavers and realleges each and every allegation as hereinabove set forth and for a third cause of action,

reserving all rights, and waiving none, avers that she is entitled to relief as against the various named parties defendant, all as named in her second cause of action, which listing of names in incorporated herein by reference to avoid needless repetition, and the Defendant, The Retail Credit Company, for and because of the conspiracy between the various named individual parties, employees of the Defendant, The Retail Credit Company, and the Corporate Defendant itself, Retail Credit Company, and the various and other named parties and unnamed parties individual and corporate, because of the following facts, to-wit:

Your Plaintiff would show unto the Court that the Retail Credit *Company directs and orders its employees, as well as its customers, under pain of suffering discharge from employment and Law Suits respectively, to engage in a course of conduct together with one another and the body corporate Retail Credit to act in conspiracy, in effect, to deceive persons such as the Plaintiff from discovering any rights against the Defendant,* The Retail Credit Company, which the various parties may have, and your Plaintiff would show unto the Court that in fact, this is what happened in her case, and *that a conspiracy did exist to deprive her of her rights against The Retail Credit Company as between the Retail Credit Company and its employees, and customers.* [emphasis added]

Your Plaintiff would show unto the Court that the course of action, in conspiracy and concert, was of such character and nature as would denote and connote malice and malicious conduct and wanton and reckless disregard of the rights of your Plaintiff.

Because of which and all of which your Plaintiff sues and demands damages, both compensatory and punitive of the parties defendant named and unnamed.

VIII

FOURTH CAUSE OF ACTION

And now for the fourth cause of action, your Plaintiff reavers and realleges each and every allegation as hereinabove set forth and for a fourth cause of action, reserving all rights, and waiving none, avers that she is entitled to relief against the Defendant, The Retail Credit Company, and the other named and unnamed defendants as enumerated hereinabove in the style of this case, which list of names is incorporated herein by reference, for the following facts, to-wit:

The Plaintiff would show unto the Court that between the years 1961 and 1968, during which most of the conspiracy hereinabove mentioned ran its course, save and except for the bearing of fruit which occurred as late as August 16, 1972, there existed a custom and usage in the State of Mississippi and the United States under which mercantile credit reports and the contents thereof, whether favorable or unfavorable, were concealed from the person upon whom the report was made, by both employees of the company and the companies themselves, as well as the customers of the companies. The said companies who concealed in concert with their employees and their customers, were engaged in the business of producing and manufacturing the said credit reports.

Now, your Plaintiff would show unto the Court that during the years in which the conspiracy was initiated, up to and until the years from 1961 forward, as known at the present time to your Plaintiff, although the conspiracy may have existed earlier, that until 1971, in the spring, that in the various states in the United States and that in the State of Mississippi there existed a defeasible, contingent privilege granted either by the jurisprudence of the statutory law of the various jurisdictions involved herein, to companies preparing and manufacturing mercantile credit reports, which jurisprudence and statutes give a conditional qualified privilege to the said mercantile credit reporting companies, their employees and customers, thereby giving them the right to operate under color of law.

Plaintiff brings this her fourth cause of action under 42 *United States Code*, Section 1983, 1985 and 1986.

Plaintiff charges that the defendants and each of them, acting under color of law, in concert and conspiracy, both as individuals and as a body corporate, did, during the period 1961 through 1968, conspire against her, under color of law to deprive her of her natural, God given rights and her rights under the laws of the State of Mississippi, the Constitution of the State of Mississippi, and the laws of the United States and the Constitution of the United States in that they did, to-wit:

Begin a conspiracy in the year 1961 which continued through the year 1968, operating under color of law, and, although your Plaintiff believes that it began in

1961 she is without definite knowledge of the initiation date of the said conspiracy.

Your Plaintiff would show unto the Court that the acts of the defendants caused your Plaintiff to be deprived of business and social intercourse by the preparation and production and manufacturing of erroneous, defective and faulty credit reports on her person, character, and business ability.

Your Plaintiff would show that the persons to whom these credit *reports were sent, the various customers of the defendant, were under affirmative contract with the defendant, expressed in writing, to conceal the contents of the said reports from your Plaintiff, and that they did act in concert and conspiracy under contract with the various other parties* defendant to conceal the said report. The name and address of each of these said parties defendant will be furnished the Court by the Defendant, The Retail Credit Company, upon appropriate discovery thereof. The Plaintiff will initiate such discovery and incorporate such other parties defendant under the various Does and Roes upon discovery of the same. [emphasis added]

Your Plaintiff would show unto the Court that, acting under local custom, and the force and authority of law inasmuch as the same was sanctioned under the jurisprudence and statutory law of the various jurisdictions, that the defendants did engage in a course of conduct which actually caused her to lose her business, caused her to lose wealth, social intercourse, personal advantages in life and denied her the pursuit of happiness and the gainful pursuit of her employ-

ment all through the wanton and reckless disregard for her peace of mind, her privacy, her God given and Constitutionally endowed rights for the pursuit of happiness in a normal life, and Defendants deprived Plaintiff of property rights by destroying her business and business opportunities.

Your Plaintiff would show unto the Court, that she is entitled to damages as against the parties defendant, named and unnamed for their unwarranted, unreasonable and malicious conspiracy to deprive her of her property rights and civil rights under color of law and local custom, under the above and foregoing Civil Rights Acts and the character of the acts of the Defendants were such as would warrant the imposition of punitive damages inasmuch as they were action in a wanton, and malicious manner.

Because of which and all of which your Plaintiff sues and demands damages, both compensatory and actual, punitive and exemplary of the various parties defendant, named and unnamed.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff would seek Judgment of this Honorable Court of, from and against each and every one of the various parties defendant Robert W. Biccum, J. W. Miller, C. A. Grobe, G. O. Pittman, J. J. Curtis, T. E. Drone, Charles L. Hammond, and Doe 1, Doe 2, Doe 3, Doe 4, Doe 5, Doe 6, Doe 7, Doe 8, Doe 9, and Doe 10, all individuals, and Retail Credit Company, Inc., Roe 1, Roe 2, Roe 3, Roe 4, Roe 5, Roe 6, Roe 7, Roe 8, Roe 9, and Roe 10, Bodies Corporate, based upon the indicated several and separate causes of action, because of which and all of which your Plaintiff sues and

demands damages both compensatory and punitive, actual and exemplary of the various parties defendant for their malicious and conspiratorial conduct.

WHEREFORE, your Plaintiff sues and demands damages of, from and against the various parties defendant for each and every cause of action and your Plaintiff demands judgment against the individual defendants, as well as all defendants jointly and severally for the causes of action wherein each of them is indicated as a defendant, in the sum of One Million Dollars ($1,000,000.00) actual and compensatory damages, and the full sum and amount of an additional One Million Dollars ($1,000,000.00) punitive and exemplary damages, making the full sum total of Two Million Dollars ($2,000,000.00) together with all costs of this proceeding for each and every one of the alternative actions as hereinabove stated in causes of action One through Four.

WHEREFORE, your Plaintiff sues and demands damages of, from and against the parties defendant as enumerated and named in causes of action One, et sequitur, for the conspiratorial activities of the various named parties and each and every one of the several causes of action, jointly and severally against each and every one of the various parties defendant named in the causes of action numbered one, et sequitur, in the full sum and amount of One Million Dollars ($1,000,000.00) in actual and compensatory damages, and the full sum and amount of One Million Dollars ($1,000,000.00) punitive and exemplary damages making the full sum and total of Two Million Dollars ($2,000,000.00) together with all costs of this proceeding for each and every one of the alternative actions as

hereinabove stated. Your Plaintiff demands judgment of, from and against the defendants in the full sum and amount of Two Million Dollars ($2,000,000.00)

Respectfully submitted,

MARY ELIZABETH WILSON

AND

W. ROBERTS WILSON, JR.
Attorney at Law
3132 Canty Street
P. O. Box 1507
Pascagoula, Mississippi
(601) 769-1247

BY:
/s/ W. Roberts Wilson, Jr.
W. ROBERTS WILSON, JR.,
of counsel

CERTIFICATE OF SERVICE

I, W. Roberts Wilson, Jr., attorney for Plaintiff, do hereby certify that I have this day, mailed, postage prepaid, a true and correct copy of the above and foregoing Amended Complaint to the Honorable Webb Mize, attorney for defendants, at his usual and customary post office address of Suite 310, Gulf National Bank Building, Gulfport, Mississippi, this the /s/ 25th day of June, 1973.

/s/ W. Roberts Wilson, Jr.
W. ROBERTS WILSON, JR.

OPINION OF THE COURT

In the United States District Court for the
Southern District of Mississippi, Southern Division

MARY ELIZABETH WILSON,
Plaintiff,

versus CA NO. 72S-304(R)

ROBERT W. BICCUM, Et Al,
Defendants.

Plaintiff, named above, a resident of Pascagoula, Mississippi, filed her first suit in state court on or about November 7, 1969, against Retail Credit Company, which, after removal to the U. S. District Court, became Civil Action No. 3846, on the docket of this Court. Her suit was for libel on account of a credit report made by the defendant on or about September 13, 1963. In that action Judge Harold Cox sustained defendant's motion for summary judgment on the grounds that plaintiff's suit was barred by the Mississippi one year statute of limitations, Section 732, Mississippi Code of 1942. The Court cited the complained of portion of the credit report, finding that there was nothing in the record to dispute defendant's contention that the report was qualifiedly privileged, finding that the report was made in good faith, and that plaintiff's cause of action arose when the report was received by the defendant's customer and not when plaintiff discovered its existence; hence the action was barred. On plaintiff's appeal to the Fifth Circuit Court of Appeals, that court sustained the District Court, adopting the District Court's opinion as its own. *Wilson v. Retail Credit Co.*, 438 F. 2d 1043.

At the time of Mrs. Wilson's suit, her husband, W. R. Wilson, filed a companion suit for libel, for invasion of his privacy and for denial of his property rights in violation of the Fifth and Fourteenth Amendments, all based on Mrs. Wilson's same credit report. By amendment, Wilson complained of a credit report on him, dated May 5, 1964. On defendant's motion for summary judgment, Judge Walter L. Nixon, Jr. to whom this action was assigned, after reviewing the record, including affidavits and depositions, found that any action based on Mrs. Wilson's credit report, was personal to her; both reports were made in good faith and not wantonly or with reckless regard for the truth; also found that the statute of limitations, whether for one year (Section 732, Mississippi Code of 1942) or for six years (Section 722, Ibid), had run; that Section 742, Mississippi Code of 1942, providing that, in case of concealment, the cause shall be deemed to have first accrued when such fraud is discovered, was not applicable, and sustained defendant's motion. See *Wilson v. Retail Credit Co.*, 325 F. Supp. 460. Judge Nixon, like Judge Cox, found that the reports were confidential between Retail Credit and its customers, and were qualifiedly privileged. Judge Nixon ruled that the private use of these reports was not fraudulent concealment. On plaintiff's appeal, the Fifth Circuit affirmed the decision. 457 F. 2d 1406. While the cause was pending on appeal, the Fair Credit Reporting Act, 15 U.S.C. §1681, et. seq. was enacted. The appellate court considered its application and found that it was not retroactive.

On or about January 12, 1972, Mrs. Wilson filed another suit in the District Court, assigned to the undersigned Judge, being Cause No. 72S-4(R), alleging

that Retail Credit, from June 1961 up to and including May 1964, had circulated libelous reports of her credit rating. The complaint set out seven counts based on libel per quod, invasion of privacy, and tortious interference with property rights relied on in the earlier suits, and included a count alleging that the reports were a defective product placed by defendant in interstate commerce, causing plaintiff great harm. On Defendant's motion for summary judgment, based on the pleadings, admissions, interrogatories and answers, and affidavits, this Court found plaintiff's charges unsupported by any factual recitations except for a reference to a credit report of June 1961 and the September 13, 1963 report. *Prior to a ruling on the motion, plaintiff filed leave to amend to add individuals as party defendants for counts based on a conspiracy*, namely, Robert W. Biccum, J. W. Miller, C. A. Grobe, G. O. Pittman, J. J. Curtis, T. E. Drone, and Charles L. Hammond and Doe 1 to Doe 10. *Because the motion to amend was untimely, and obviously offered to circumvent the previous court decisions, this Court denied the motion for leave to amend without prejudice and dismissed the suit with prejudice.* [emphasis supplied]

Plaintiff felt compelled to appeal again, and again the Appellate Court affirmed the decision of the District Court, 474 F. 2d 1260, holding that in view of her previous action involving the same transactions and the same legal rights, her action was barred by the Mississippi doctrine of collateral estoppel, citing Chief Justice Ethridge of the Mississippi Supreme Court in *Garraway v. Retail Credit*, 141 So. 2d 727:

> "Collateral estoppel is a doctrine which operates following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action . . . . In short, where a question of fact essential to a judgment is actually litigated and determined by valid and final judgment, that determination is conclusive between the parties in a subsequent suit on a different cause of action. Id. at 730."

The Appellate Court added: "Every citizen is entitled to his day in Court; however, our judicial system was not designed as an experimental laboratory to license losing parties to bring vexatious and repetitive claims based on the same transaction."

In footnotes to the decision, the Appellate Court noted that plaintiff's original action and that of her husband were instituted on the theory of libel, and that in the case then before the Appellate Court, plaintiffs' case was grounded in products liability, misrepresentation and deceit, invasion of privacy, and interference with property and contract rights. The Appellate Court then said: "Regardless of the disingenuous characterization, no new facts are alleged in the present litigation which were not already decided by the previous suit."

Not in any manner daunted by these decisions, plaintiff has filed her third action in the District Court, now before the undersigned Judge, this time against Retail Credit Company, seven individual employees thereof, Doe 1 through Doe 10, and Roe 1 through 10,

designated as bodies corporate. Plaintiff claims jurisdiction under 42 U.S.C. §§1983, 1985 and 1986. The Court notes that these are not jurisdictional statutes, but statutes granting a cause of action once jurisdiction is established. The complaint is in four counts, amended to add another defendant, Bobby Gann, and a series of overt acts, each count alleging a conspiracy among the named defendants to conceal from her information in Retail Credit's files on which to base a cause of action against that firm. She claims that their conspiratorial actions have impeded her from exercising her legal remedies as late as August 16, 1972 when this Court dismissed her last suit, Cause No. 72S-4(R). She avers that the defendants were acting under color of law in the State of Mississippi, Georgia, Tennessee and other jurisdictions in their conspiracy while protected by the qualified privilege granted by these states and this Court, allowing them to conceal from plaintiff her right to sue. She charges that Retail Credit directs its employees, under pain of dismissal, to engage in conduct with one another to deceive persons such as plaintiff from discovering her cause of action. She charges that unnamed customers of Retail Credit were under a written contract to conceal the contents of her credit report from her and also acted in the conspiracy with the named defendants. She charges that the individual defendants acted both under the directions of Retail Credit and on their own ingenious and personal initiative. She alleges that these actions were wilful, wanton and malicious entitling her to compensatory and punitive damages in the amount of $2,000,000.00 under each count. By her amended complaint, plaintiff has alleged overt acts on the part of individual defendants over a period of time beginning October 25, 1963 to January 10, 1967,

consisting of intra-office memos, which she alleges were for the purpose of concealing her cause of action based on the September 13, 1963 credit report.

As to the original complaint as well as to the amended complaint, defendants have denied that plaintiff has stated a claim upon which relief may be had, have denied all material allegations, have pled that the credit report of September 13, 1963, was qualifiedly privileged, that the action is barred by both the one year and six year Mississippi statute of limitations, have pled collateral estoppel and res adjudicata by virtue of the decisions in her prior suits, and laches inasmuch as she could have asserted her conspiracy claims since the latter part of 1963, when Judge Nixon found that she admitted knowledge of her credit report.

Considerable discovery has taken place, plaintiff having directed requests for admissions and interrogatories to all the defendants but Gann.

Defendants have filed a motion to dismiss, and for a summary judgment based on the pleadings, admissions, answers to interrogatories and affidavits, including affidavits from all individual defendants, but Gann, that each, while employed by Retail Credit during the years 1963 and 1964 and with respect to plaintiff, were merely fulfilling their assigned duties.

Plaintiff has also filed a motion for a partial summary judgment on liability, supported by an allegation against Gann, and the affidavits and deposition of Len O. Holloway and the affidavit of William F. Boaz to the effect that Retail Credit had a policy of requiring a

percentage of its investigator's reports to be derogatory. The Court has reviewed each of these documents and finds that none are relevant or material to this action. Plaintiff's affidavit in support of her motion acknowledges that all her contacts with any of the defendants were in regard to the 1963 credit report on her and a May 1964 report on her husband. Plaintiff's attorney's affidavit merely states that the proposed amended complaint, denied by this Court in Cause No. 72S-4(R) were in nature and substance, the same as the allegations here.

As to defendants' motion to dismiss and for summary judgment, both are well taken. The kind of state action required under 42 U.S.C. §1983 certainly does not contemplate case law of the State of Mississippi, nor the decisions by this Court and the Fifth Circuit recognizing the case law of Mississippi. Any and all allegations alleging state action under 42 U.S.C. 1983 should therefore be dismissed with prejudice. Any and all allegations pertaining to 42 U.S.C. §1986 should be dismissed with prejudice as not occurring within one year of the time this action was filed. Section 1986 has its own one year limitation period. As to all the allegations of the amended complaint, whether related to Sections 1983, 1985 or 1986, 42 U.S.C., they are still based on the credit report of September 13, 1963, which all the decisions referred to herein have found was qualified and any action arising out of or because of it was barred by Mississippi's six year statute of limitations.

Accordingly the motion for summary judgment is well taken for the same reason given by the Fifth Circuit in its decision reported at 474 F. 2d p. 1261, that is, collateral estoppel.

An appropriate order may be submitted within the time provided for by local rules, taxing costs to the plaintiff.

/s/ Dan M. Russell, Jr.
UNITED STATES
DISTRICT JUDGE

DATED: /s/ Nov. 26, 1974

Mary Elizabeth Wilson,
Plaintiff-Appellant,

v.

Robert W. BICCUM, J. W. Miller, C. A. Grobe, G. O. Pittman, J. J. Curtis, T. E. Drone, Charles L. Hammond and Retail Credit Company, Defendants-Appellees.

No. 75-1033.

United States Court of Appeals, Fifth Circuit.

Feb. 3, 1977.

Appeal from the United States District Court for the Southern District of Mississippi; Dan M. Russell, Jr., Chief Judge.

Before BROWN, Chief Judge, and JONES and GOLDBERG, Circuit Judges.

PER CURIAM:

With undaunted perseverance reflected by at least

four decisions in this Court,[1] Appellant, on a theory of a conspiracy by defendants to conceal their fraud, seeks to bring this case under 42 U.S.C.A. §§ 1983, 1985(3), and 1986. The District Court granted summary judgment which we sustain. There is no adequate state action so § 1983 is unavailable. The § 1985(3) falls before our en banc decision in *McLellan v. Mississippi Power & Light Co.*, 5 Cir., 1976, slip opinion p. ____, ____ F.2d ____, rev'g., 526 F.2d 870. As to the asserted pendent state claim no error has been demonstrated.

AFFIRMED.

United States Court of Appeals
Fifth Circuit
Office of the Clerk
March 10, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-1033 — Mary Elizabeth Wilson v. Robert W. Biccum, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be

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1 *Wilson v. Retail Credit Co.*, 5 Cir., 1973, 474 F.2d 1260; *Wilson v. Retail Credit Co.*, 5 Cir., 1972, 457 F.2d 1406; *Wilson v. Retail Credit Co.*, S.D.Miss., No. 3846, Aff'd., 5 Cir. 1971, 438 F.2d 1043. *Wilson v. Retail Credit Co.*, S.D.Miss., No. 3846 was originally filed in the Circuit Court of Harrison County, Mississippi, and was removed to the District Court.

polled on rehearing en banc. (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg
cc: Mr. W. Roberts Wilson, Jr.
Mr. Augusta Elliott Wilson
Mr. John B. Wilkes
Mr. Webb M. Mize

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1746

MARY ELIZABETH WILSON,
Plaintiff-Petitioner,

versus

ROBERT W. BICCUM, J. W. MILLER, C. A. GROBE, G. O. PITTMAN, J. J. CURTIS, T. E. DRONE, CHARLES L. HAMMOND AND RETAIL CREDIT COMPANY,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 76-1746

MARY ELIZABETH WILSON,
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Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Mary Elizabeth Wilson, Plaintiff-Appellant, vs. Robert W. Biccum, J. W. Miller, C. A. Grobe, G. O. Pittman, J. J. Curtis, T. E. Drone, Charles L. Hammond and Retail Credit Company*, Defendants-Appellees, 546 F. 2d 676, which affirmed the Opinion of the United States District Court for the Southern District of Mississippi. Both Opinions are in the Appendix to the Petition for Writ of Certiorari.

On the 20th day of June, 1977, the United States Court of Appeals for the Fifth Circuit overruled the Motion of the Plaintiff-Appellant for recall and stay of the issuance of the Mandate and there is a copy of that Order in the Appendix hereto.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 USC 1254 (1). Petitioner has posed eight questions for review, none of which, in our opinion, would justify a review by way of Certiorari (Rule 19, 1).

QUESTIONS PRESENTED

The questions presented by the Plaintiff-Petitioner grow out of 42 USC 1983 and 42 USC 1986, although we consider all of the questions set forth as being presented in the Petition for a Writ of Certiorari to be false and misleading and that, rather, the questions should be:

a) May a Petitioner avoid being collaterally estopped by recasting adjudicated issues and facts in the form of an action under the Civil Rights Statutes?

b) Is this suit barred by Collateral Estoppel, *Stare Decisis, Res Adjudicata* and *Statute of Limitations* and *Laches*?

STATUTES INVOLVED

1) 42 USC 1983
2) 42 USC 1986
3) Section 15-1-35, Mississippi Code of 1972
4) Section 15-1-49, Mississippi Code of 1972

STATEMENT OF THE CASE

The present case is the fourth appearance of facts and substance constituting the alleged cause of action filed by the Plaintiff-Petitioner, two of the previous suits being by the Plaintiff-Petitioner against the Defendant-Respondent, Retail Credit Company, now Equifax Inc. The individual Defendants were employees of Retail Credit Company and in privity with Retail Credit Company as to matters, substance and facts in this cause. The former cases referred to are: *Mary Wilson vs. Retail Credit Company*, 438 F. 2d 1043, *W. Roberts Wilson vs. Retail Credit Company*, 457 F. 2d 1406, affirming the District Court, 325 F. Supp. 460, and *Mary Elizabeth Wilson vs. Retail Credit Company*, 474 F. 2d 1260. The facts in this case have been heard by each of the Federal District Judges for the Southern District of Mississippi, and by Judges Brown, Goldberg, Gewin, Jones, Ainsworth, Simpson, Bell and Dyer, of the United States Court of Appeals for the Fifth Circuit. The best statement of the case is contained in the Opinion of the District Court, which appears in the Appendix to the Petition for Writ of Certiorari at pages 25a to 32a.

This present suit, as well as the previous three suits, resulted in Summary Judgments on behalf of the

Defendant. In the Record in the instant suit is the complete transcript of all proceedings in the first three suits, showing that the facts essential to the Judgment were actually litigated and determined by valid Final Judgments in the previous suits, which previous suits were not on the theory of a violation of Civil Rights.

The Complaint in the present suit attempts to charge violation of Civil Rights by virtue of a conspiracy between the employees of Retail Credit Company and Retail Credit Company. The allegations of overt actions consist of memoranda, letters and office communications, which were before the Court in all of the former suits.

In the present suit the Motion for Summary Judgment was accompanied by Affidavits of the individual Defendants, all of which showed no conspiracy. There were no counter-affidavits filed on this issue.

Other portions of the Facts will be more fully developed in the Argument.

REASONS FOR DENYING THE WRIT

No questions of substance are presented by Plaintiff-Petitioner that show denial of rights, depriving Petitioner of her day in Court. There is shown no special or important reason for granting the Writ, and the United States Court of Appeals for the Fifth Circuit has not decided an important state or territorial question in this cause in conflict with another Court of Appeals and has not decided an important state or

territorial question in conflict with applicable state or territorial law, and has not decided a question not already settled by this Court, and has not decided a federal question in conflict with applicable decisions of this Court, and has not departed from accepted and usual courses of Judicial proceedings, to call for supervision by this Court.

We do not find in the Petition for Writ of Certiorari that the Plaintiff-Petitioner claims any constitutional right as being violated unless same is included under the Civil Rights Statutes we referred to.

ARGUMENT

The Plaintiff-Petitioner commences argument by citing *Griffin vs. Breckinridge*, 403 U. S. 88, 102-03 (1971), and *Westberry vs. Gilman Paper Company*, 60 FRD 447, and *McLellan vs. Mississippi Power Company*, 526 F. 2d 870, which cases give no help whatever to the Plaintiff-Petitioner, as not all private conspiracies to interfere with the rights of another fall within the Civil Rights Statute.

The instant case was decided on a Motion for Summary Judgment, the Complaint in the case attempting to allege a conspiracy for the violation of the civil rights of the Plaintiff-Petitioner, and there were asserted certain alleged overt acts, which alleged overt acts were in the record of the first of the Wilson suits, as well as in the record of all succeeding ones.

The claimed conspiracy was alleged to have commenced by the writing of a Retail Credit Character and Financial Report on September 13, 1963, and in that

report it was stated, "Others are more severe in their criticism, regarding her as neurotic or psychotic." The alleged overt acts, alleged in the complaint to continue through 1964, consists of letters and office memoranda of employees of Retail Credit Company, but it is alleged that the fruits of the conspiracy culminated on August 16, 1972, when the Court ordered a Summary Judgment based on the Statute of Limitations. This is the Summary Judgment that was appealed and is reported at 474 F. 2d 1260. Summary Judgments entered in the first three Wilson cases were all appealed to the United States Court of Appeals for the Fifth Circuit, and, as aforesaid, all were affirmed. No application was made in any for a Writ of Certiorari to the United States Supreme Court, and the Judgments in the first three Wilson cases are certainly final.

Retail Credit Company, the Respondent here, and the Appellee in all of the Wilson cases, filed affidavits and proof with its Motions for Summary Judgment, in each case, and such proof consisted of depositions, affidavits and admissions. In this cause, the Plaintiff-Petitioner did not file any counter-affidavits, or affidavits, to deny that there was not a conspiracy, under Rule 56(e), Rules of Civil Procedure. Nothing was filed for consideration by the Court to show that there was a genuine issue for trial, as required by such Rule. There is nothing in the record to show that the individual Defendants were not in privity with Retail Credit Company; in fact, all of the proof is to the contrary.

Certainly, the Plaintiff-Petitioner, in the arguments set forth, relies wholly upon allegations of the Com-

plaint, which allegations are not supported by proof (and no proof was offered), and on wishful thinking. There was no genuine issue of fact, and the proof of the Defendants-Respondents stands uncontradicted. *Sitton vs. U. S.*, 413 F. 2d 1386, Cert. denied, 90 S. Ct. 1118, 397 U. S. 988, 25 L. Ed. 395.

Throughout the Petition for the Writ, more than a dozen times, it is stated that the Plaintiff-Petitioner was denied her day in Court, even though this is her fourth case based on the same facts; and, Plaintiff-Petitioner has stated that her cases should not have been dismissed at the pleading stage. We believe that Plaintiff-Petitioner means she should have had a Jury trial, and that her conception is that a hearing on a Summary Judgment is not a hearing on the merits. This theory has been argued on a previous appeal.

PLAINTIFF-PETITIONER'S QUESTION I

Petitioner's Question I is really not a question. Certainly, an individual citizen has the right to resort to the Courts in a Civil suit and the Plaintiff-Petitioner has resorted to the Court, and has been very persistent in her pursuit of damages against the Retail Credit Company. We agree that a citizen has the right of access to the Courts, and that that is a fundamental right. We further agree that a citizen has the right to litigate and sue, and is entitled to equal protection under the law, with full access to the Court for the prevention and redress of wrong. We assert, however, that the Plaintiff-Petitioner has had full access to the Courts, as is shown amply by the former Wilson cases, and the record in this case. Certainly, Question I gives no right for a review by the Court.

PLAINTIFF-PETITIONER'S QUESTION II

Plaintiff-Petitioner's Question II is certainly falsely posed but gives no right for a review by this Court. The allegations of the Complaint and the proof do not sustain some of the incorrect assertions made by Plaintiff-Petitioner in argument. No conspiracy was proved, nor was proof offered, nor, for that matter, do we think any conspiracy was properly alleged; and, certainly, this case is not properly what we consider a Civil Rights case. Nothing is stated in the Complaint except mere conclusions of the Pleader. If the present suit is properly a Civil Rights suit, then any tort action could be brought under the Civil Rights statutes and we do not believe that it is the intent of the Act that every tort or injury might be brought under the Civil Rights statute. There is no racial animus and no state action. The Plaintiff-Petitioner does not represent any Class. Charging in the Complaint is not sufficient without proof. The Civil Rights statutes do not attempt to reach a conspiracy to deprive one of civil rights unless deprived of equality, equal protection of the laws, or equal protection and immunity under the law. *Collins vs. Hardyman*, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253.

Plaintiff-Petitioner claims her rights were violated because of non access to the Courts, and that she was deprived of her constitutional rights under color of state law. The fact that the decisions and statutes of the State of Mississippi prevented recovery by Mrs. Wilson because of Qualified Privilege and Limitation of Action is not sufficient involvement by the State to be an action under color of State law within the meaning of the Civil Rights Act. *Martin vs. Pacific*

Northwest Telephone Co., 441 F. 2d 116, Cert. denied, 92 S. Ct. 89, 404 U. S. 873, 30 L. Ed. 117.

Plaintiff-Petitioner alleges that she was "lied to." This is stated at least twice; but, there is no proof whatever in the record to sustain that allegation. Mistakenly, the Plaintiff-Petitioner argues that her former suits were not heard on the merits, meaning that a suit dismissed on Summary Judgment is not dismissal on the merits.

It is also stated by the Plaintiff-Petitioner that it was impossible for her to learn the nature of the libelous credit reports, and this was argued in Mrs. Wilson's second suit.

On page 21 of the Petition, the Plaintiff-Petitioner states that the two earlier suits — one for libel, and the other for products liability, "were dismissed because the statute of limitations problem and the technicality of failure to allege malice."

This statement in the Petition is erroneous, as we can find nothing in the Opinions of the Court in the former cases to state that a dismissal occurred because of malice. The Opinion, however, does state:[1]

> "Nothing in the Report indicates any malice, or that anything more was done than simply report in good faith what they found from informants to be the facts about which such questionnaire related . . ."

---

1 438 F. 2d 1043

and

> "There is nothing in the record before the Court to show the existence of any fraud on the part of the Defendant . . ."

and

> "Nothing is said in any response to that motion to deny good faith on the part of the defendant in making such report."

In the Opinion in the second Wilson case,[2] we find:

> "Likewise, the inter-office memoranda do not reflect any bad faith or malice on the part of the employees of the defendant company, but merely demonstrate their understandable concern that the contents of a confidential report had been revealed to the person who was the subject thereof and their attempts to verify the information contained therein."

Another misleading statement is made by the Plaintiff-Petitioner: "Although the instant case demonstrates clear and convincing evidence sufficient to establish the conspiracy without circumstantial evidence . . ." No evidence was presented by the Plaintiff-Petitioner, and the statement just above quoted is entirely erroneous.

We believe it must be the position of the Plaintiff-Petitioner that filing affidavits in Court and filing a

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2 *W. R. Wilson vs. Retail Credit Company*, 325 F.Supp. 460, affirmed at 457 F. 2d 1406.

Motion for Summary Judgment, denies the Plaintiff-Petitioner her day in Court. She states that affidavits that were filed were false and misleading, although there is no proof of this, and nothing was filed in the District Court to support this statement. The Findings of the Court below in these cases clearly indicate the falsity of these unfair and unwarranted statements in Plaintiff-Petitioner's Petition for the Writ.

It is further argued under Question II that:

> ". . . the defendants' reliance on the judicially protected privilege and the custom and usage of the times, made it virtually impossible for the plaintiff to learn of the nature of the libelous credit reports, and this appears to be sufficient to state a cause of action uner [sic] 42 USC § 1983, because there was a discriminatory action by the defendants against the class of persons upon whom libelous credit reports were made."

That statement is most interesting, inasmuch as it has been urged in all of the previous three Wilson cases, and, from the Opinion in 325 F. Supp. 460, page 465, we find:

> "The deposition of the plaintiff's wife and the affidavits of various Commercial Credit Company employees, filed in Civil Action No. 3846, reveal that Mrs. Wilson made numerous inquiries concerning this 1963 report, and in doing so, informed these employees of her knowledge of the existence of the report. She

also claimed to have seen the report and have knowledge of the contents thereof. Although Mrs. Wilson, in her deposition, claims to have only been 'fishing' or 'bluffing' in these assertions, it would seem to be more than coincidental that she should use the word 'neurotic' in referring to the contents of her report. See Atwell v. Retail Credit Company, 431 F. 2d 1008 (C. A. 4, 1970). In order for a particular misrepresentation to constitute fraud which would toll the running of the Statute of Limitations, it must be made under such circumstances, and be of such nature that a reasonably prudent person would act thereon. New York Life Ins. Co. v Gill, 182 Miss. 815, 182 So. 109 (1938)."

We further cannot understand the statement on page 27 of the Petition, where it is stated,

> ". . . it is obvious as well as law of the case that Mrs. Wilson was not able to sue the defendant Retail Credit Company after the defendants undertook all of the activities, mentioned above and below, which are the basis of this present suit."

Our answer to this is that Mrs. Wilson has filed three separate suits on the same facts and has had the opportunity of suing since the year 1963, when she first learned of the contents of the report.

Furthermore, the overt acts set forth as part of the claimed conspiracy to violate the Civil Rights of the

Plaintiff-Petitioner, delineated in the Amended Complaint in this cause, are all set out in the Report of the Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary in the United States Senate, Ninetieth Congress, Second Session, pursuant to Senate Resolution No. 233, Credit Bureaus and Reporting, held on December 10 and 11, 1968.

While the record shows, and the Opinion of the Court, as aforesaid shows, that Mrs. Wilson was fully cognizant of the nature of the report prior to the Senate Hearings, these so-called overt acts were made public during the Hearings and are published in the record.

Furthermore, in a deposition in Mrs. Wilson's first case (Supplemental Record 25, pages 16-17 thereof) the Plaintiff-Petitioner agreed that her file might be opened to the public.

The Plaintiff-Petitioner argues that the Statute of Limitations does not run until commission of the last overt act done in the pursuance of the conspiracy. No conspiracy was shown in this case. There is not a scintilla of evidence of any conspiracy. No evidence by affidavit or otherwise, as to such, was introduced or filed on the Motion for Summary Judgment, which Motion the Court sustained. The proof was to the contrary, that there was no conspiracy among the Defendants.

The last overt act alleged was that of the District Court granting Summary Judgment in Mrs. Wilson's second suit. This is a lefthanded allegation that the Court was a part of the conspiracy because it granted Summary Judgment.

The allegation that the Plaintiff-Petitioner is a member of a class is meaningless, as the Statute of Limitations of Mississippi, and the laws of privilege, are common to all citizens.

The claim of the Plaintiff-Petitioner to being a member of a class, which we do not consider applicable in this case, cites affidavit and deposition of Len O. Holloway, who worked for Retail Credit Company for a short while in 1968 and 1969, some five or six years after the so-called libelous report was made,[3] and we assume that the Plaintiff-Petitioner felt that because a bad report was made on her she was in that percentage and became a member of a Class. However, Mrs. Wilson's report was made long prior to 1968, the time spoken of by witness Holloway. The lower Court in this cause, in its Opinion, found that both affidavits were irrelevant and immaterial to the action.

PLAINTIFF-PETITIONER'S QUESTION III

Plaintiff-Petitioner's Question III is inconsequential. The proof does not show that the Defendants-Respondents were conspirators. The proof does not show that the individual Defendants-Respondents were acting in an individual, separate and distinct capacity, and for their benefit separately. The proof in the record concerning the alleged conspiracy is that offered by the individual Defendants-Respondents.

3 Affidavit of Boaz was likewise filed after submission of Motion for Summary Judgment. Affidavit of Boaz stated that there was a policy for some percentage of reports to be rejected, although this affidavit was not relevant, and was filed too late. Boaz was not acquainted with Plaintiff-Petitioner and worked only out of the Richmond, Virginia, office. He stated Retail Credit Company required certain rejections.

This proof conclusively shows that all that was done by the individuals was in their capacity as employees, agents, or as attorneys for the Defendant-Respondent Retail Credit Company. The allegations of the Complaint cannot be considered as evidence and these allegations cannot contravert the proof on Motion for Summary Judgment.

PLAINTIFF-PETITIONER'S QUESTION IV

Plaintiff-Petitioner's Question IV is also a false issue in this suit. The first Paragraph of the Argument of Plaintiff-Petitioner under Question IV disposes of the question as being frivolous. It shows that no proof of damage has been made and that the damage occurred at one time or the other when one of the Motions for Summary Judgment was sustained. This is tried to be tied in with the alleged conspiracy, making the Court a part of the conspiracy by sustaining Motions for Summary Judgment. No injury to person or property has been proven in the instant case. Contrary to the statement in Plaintiff-Petitioner's Argument: "Plaintiff filed her first suit and was denied a trial on the merits," the Plaintiff-Petitioner has had successive trials. The District Court, in its Opinion in this cause, states:

> "The kind of state action required under 42 U. S. C., §1983, certainly does not contemplate case law of the State of Mississippi, nor the decisions by this Court and the Fifth Circuit recognizing the case law of Mississippi. Any and all allegations alleging state action under 42 U. S. C. 1983 should therefore be dismissed with prejudice."

PLAINTIFF-PETITIONER'S QUESTION V

Again, Question V is a false issue. The posed question assumes that there was a conspiracy. The proof shows that there was none. The proof shows that no individual Defendant-Respondent conspired for his separate benefit. Unless collateral estoppel is the law of this case, collateral estoppel is meaningless. The overt acts, alleged as being part of the conspiracy engaged in by the individual Defendants-Respondents, were a part of the Senate Hearings, as foresaid. Those papers, documents and memoranda before the Senate Committee, and in the record, in each of the Wilson cases, contained the same question of fact and, as was said in *Mary Elizabeth Wilson vs. Retail Credit Company*, 474 F. 2d 1260:

> "In short, where a question of fact essential to a judgment is actually litigated and determined by a valid and final judgment, that determination is conclusive between the parties in a subsequent suit on a different cause of action."

The Opinion of the Fifth Circuit Court of Appeals in this cause does not mention collateral estoppel, but affirms the District Court, which stated:

> "Accordingly the motion for summary judgment is well taken for the same reason given by the Fifth Circuit in its decision reported at 474 F. 2d, p. 1261, that is, collateral estoppel."[4]

4 The Lower Court's Opinion, however, also held that the Statute of Limitations applied.

There is nothing in the proof to show that the individual Defendants-Respondents were not in privity with the corporation, Defendant-Respondent Retail Credit Company. There is nothing to indicate that the individual Defendants-Respondents were acting personally and for their own benefit.

> ". . . 'A final valid determination on the merits is conclusive on the parties and those *in privity* with them as to the matters adjudged, or which should have been litigated in another action or proceeding involving the same cause of action.' " (emphasis ours) *Sitton vs. U.S., supra*.

Many misleading statements are made in the Petition, and certain cases are cited in support of the statement that collateral estoppel cannot be applied in Civil Rights actions in the Federal Court. The cases do not support that statement.

In the case of *Kaufman vs. Moss*, 420 F. 2d 1270, we find that

> "Where a Motion to Dismiss is made on the basis of collateral estoppel, it is usually necessary for the Court to examine the record of the prior trial, unless it appears on the face of the Complaint that it is barred by issues decided in the prior adjudication."

The entire record of all of the three former Wilson cases was before the Court on the Motion to Dismiss and the Motion for Summary Judgment.

Where a Court of competent jurisdiction has entered final Judgment on the merits, the parties and their privity are bound not only as to matters offered and received to sustain or defeat claim or demand, but as to any other admissible matter which might have been offered. *Sealand Services, Inc. vs. Gaudet*, 94 S. Ct. 806, 414 U. S. 573, 39 L. Ed. 2d 9, Rehearing denied, 94 S. Ct. 582, 415 U. S. 986, 39 L. Ed. 2d 883. *Rankin vs. State of Florida*, 418 F. 2d 482, Cert. denied, 90 S. Ct. 1358, 397 U. S. 1039, 25 L. Ed. 2d 650.

The case of *Garrigan vs. Giese, et al*, 420 F. Supp. 68, Affirmed, 553 F. 2d 35 (1977) concerned an action that was brought three times, claiming a conspiracy for the reduction of Civil Service grade by the United States and certain Army employees who participated in the grade reduction. That recent case was similar to the instant case in that the facts were the same and different causes of action were alleged in the separate suits, as well as different causes of action against the privies, and the Court held that *res adjudicata* and estoppel applied.

PLAINTIFF-PETITIONER'S QUESTION VI

The Plaintiff-Petitioner does not separately argue his Question VI, and we will follow the same course.

PLAINTIFF-PETITIONER'S QUESTION VII

Plaintiff-Petitioner's Question VII is likewise false. There is no proof that damage did not occur until February 20, 1973, and there is no proof of any damage occurring at all. All of the overt acts are contained in the Senate Report, with the exception of the allegation

that the Defendant-Respondent obtained Summary Judgments and Dismissals of the former suits.

We believe that the law is that a Defendant is entitled to make any valid defense that it might have. The original suit was a tort suit, based on libel; then we had products liability, invasion of privacy, deprivation of constitutional rights, etc. (it having been argued in Mrs. Wilson's second suit that she was denied her rights under the Constitution). She argued and contended that the application of the Statute of Limitations deprived her of due process of law on her alleged claim. She further contended she had been denied the equal protection of the law. This issue was heard, argued and determined in a previous appeal. We do not see how this Court can determine any damage as no proof of same has been offered.

PLAINTIFF-PETITIONER'S QUESTION VIII

No issue is raised by Plaintiff-Petitioner's Question VIII. The collateral estoppel does apply to all claims upon which all of the Wilson suits have been heard and determined. There is no pendent claim.

CONCLUSION

Even though the Plaintiff-Petitioner names this action as a Civil Rights suit, or a conspiracy to violate the Civil Rights of the Plaintiff-Petitioner, this does not make it so. Even though, in the Petition, she talks of a conspiracy, there is no cause of action stated, only conclusions. Retail Credit Company is a corporation. All of the many individuals who have been served with process are agents or officers and occupy some

managerial or professional position with Retail Credit Company, with the exception of Charles L. Hammond who, at the time complained of, occupied a position with Retail Credit Company as an investigator and wrote the report that has been the subject of all of the litigation. His affidavit showed that he never conspired tortiously or otherwise with any of the Defendants-Respondents in this cause against the Plaintiff-Petitioner, and that everything he did was in relation to his employment.

We pointed out, under Questions presented, that the Plaintiff-Petitioner was collaterally estopped from filing this suit as she recast adjudicated issues and facts in the attempted action under the Civil Rights Statutes, and that the suit was barred by Collateral Estoppel, *Stare Decisis, Res Adjudicata* and Statute of Limitations and *Laches*.

Actually, in the case now before the Court the Plaintiff-Petitioner attempts to substitute this suit for the right of appeal of previous cases growing out of the same facts. No applications for Certiorari to this Court were made in any of the earlier suits. See *Angel vs. Bullington*, 67 S. Ct. 657, 330 U. S. 183, 91 L. Ed. 832.

Again, in this cause, the Plaintiff-Petitioner states that a Summary Judgment cannot have a collateral estoppel effect and that by attempting to bring this suit on the theory of denial of Civil Rights that there is no collateral estoppel.

The Fifth Circuit recently, in the case of *Exhibitors Poster Exchange, Inc. vs. National Screen Service Corporation*, 543 F. 2d 1106, held that repeated actions

such as the Plaintiff-Petitioner has engaged in, in this cause, is a frivolous appeal and sanctions were allowed. In that case it was stated:

> "Once again the appellant, Exhibitors Poster Exchange, Inc., urges that a summary judgment cannot have collateral estoppel effect. The same argument was urged to us and decided against this same appellant in Exhibitors Poster Exchange, Inc. vs. National Screen Service Corporation, et al., 5 Cir., 1975, 517 F. 2d 110, cert. denied, 423 U. S. 1054, 96 S. Ct. 784, 46 L. Ed. 2d 643 (1976)."

It has been our purpose in this Response to the Petition for Writ of Certiorari to emphasize that proof was not offered to support the allegations of the First Amended Complaint, and the general rule of law is that litigation must end, and that the Court reject the right of continuous litigation of issues determined in earlier actions, especially where the causes were heard upon affidavits unrefuted and which the other party had ample time to refute. *Prichett vs. Duke Power Company*, 49 FRD 116, affirmed, 429 F. 2d 984.

The Wilson cases, all cited above, have been presented on the theories of libel, products liability, invasion of right of privacy, denial of property rights, violation of the Fifth and Fourteenth Amendments, misrepresentation and deceit, interference with property and contract rights and finally, in this cause, conspiracy to violate the Civil Rights Statutes.

It is said in a footnote in the third Wilson case:

> "... Regardless of the disingenuous characterization, no new facts are alleged in the present litigation which were not already decided by the previous suit."

We, therefore, respectfully submit that the Petition for the Writ should be denied, as there is no important federal question presented. The decision is not in conflict with other Circuits. The case does not present any new questions of law, and, litigation must come to an end, the Plaintiff-Petitioner having known the facts since the latter part of 1963.

Respectfully submitted.

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CERTIFICATE

I, Webb M. Mize, of the firm of Mize, Thompson & Blass, attorneys of record for Defendants-Respondents, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondents in Opposition to Wm. Roberts Wilson, Jr., attorney for Plaintiff-Petitioner, P. O. Box 1507, Pascagoula, Mississippi 39567.

THIS, the ____ day of July, 1977.

Webb M. Mize

APPENDIX

In the United States Court of Appeals
For the Fifth Circuit

No. 75-1033

MARY ELIZABETH WILSON,
Plaintiff-Appellant,
versus

ROBERT W. BICCUM, J. W. MILLER,
C. A. GROBE, G. O. PITTMAN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

ORDER:

The motion of appellant for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

/s/ JOHN R. BROWN
UNITED STATES
CHIEF JUDGE

[Filed: June 20, 1977]